OFFICE COPY

VOLUME I

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1960

## No. 50

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

*vs.*

NOERR MOTOR FREIGHT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1960
CERTIORARI GRANTED APRIL 18, 1960

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## APPENDIX OF EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., APPELLANTS IN NO. 12,751 AND APPELLEES IN NO. 12,750.

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### RELEVANT DOCKET ENTRIES.

| | |
|---|---|
| 1/17/53 | Complaint filed. |
| 3/30/53 | Answer of Pennsylvania Railroad Co., filed. |
| 9/15/53 | Answer of Eastern Railroad Presidents Conference, filed. |
| 1/28/54 | Order of Court granting motion of D. F. Bast, et al. to intervene as parties plaintiff, filed. |
| 5/17/56 | Stipulation as to certain facts and agreement as to scope of discovery and order approving same, filed. |
| 6/25/56 | Stipulation as to counterclaim and order approving same and counterclaim filed. |
| 7/ 3/56 | Plaintiffs' reply to defendants' counterclaim filed. |
| 4/ 5/57 | Defendants' request for findings of fact and conclusions of law (Plaintiffs' case) and counterclaimants' request for findings of fact and conclusions of law, filed. |
| 10/ 8/57 | Plaintiffs' requests for findings of fact and conclusions of law holding defendants liable for violating the antitrust laws (filed with Judge Clary 3-14-57), filed. |
| 10/10/57 | Opinion Sur Pleadings & Proof, with findings of fact and conclusions of law, granting injunctive relief and awarding certain damages, etc., filed. |

7/22/58 Opinion On Damages, Attorney's Fee and Injunctive Relief filed.

7/22/58 Final decree.

7/31/58 Order of Court dismissing Counterclaim filed by Eastern Railroad Presidents Conference, et al., filed.

7/31/58 Notice of appeal by defendants, filed.

8/18/58 Notice of appeal by plaintiffs, filed.

8/27/58 Order of Court extending time for docketing the appeal filed by defendants on 7/31/58 and the appeal filed by plaintiffs on 8/18/58 to 10/27/58 filed.

## ANSWER OF EASTERN RAILROAD PRESIDENTS CONFERENCE TO PLAINTIFFS' COMPLAINT.

Defendant, Eastern Railroad Presidents Conference, makes answer to the Complaint of Plaintiffs, to the extent to which the allegations contained therein are applicable to it, as follows:

### First Defense.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the Complaint.

3. This defendant denies the allegations of paragraph 3 of the Complaint, except that it admits that it is unincorporated, that it has offices at 143 Liberty Street, New York, New York, that its membership includes the presidents or trustees of approximately 35 railroads operating in the eastern states of the United States and that its expenses are paid by said railroads.

4. This defendant denies the allegations of paragraph 4 of the Complaint, except that it admits that this defendant maintains a functioning organization and a staff of paid personnel; has regular meetings of its members; has recently appointed David I. Mackie as its chairman at a salary of approximately $45,000 a year; and has a number of committees and subcommittees including a Committee on Public Relations.

5. This defendant denies the allegations of paragraph 5 of the Complaint, except that it admits that certain railroads are assessed for the cost of its operations.

6. This defendant denies the allegations of paragraph 6 of the Complaint, except that it admits that there is a Committee on Public Relations consisting of the persons named in paragraph 6 of the Complaint other than John J. Fitzgerald.

7. This defendant denies the allegations of paragraph 7 of the Complaint, except that it admits that on May 19, 1949 its members appointed a committee known as the Competitive Transportation Committee to be assisted by subcommittees designated Legal, Research, and Public Relations, that W. J. Tuohy was named as chairman of the Competitive Transportation Committee, and that the members then appointed to the Competitive Transportation Committee, included, among others, the persons named in paragraph 7 of the Complaint.

8. This defendant denies the allegations of paragraph 8 of the Complaint, except that it admits that certain of the individuals named as defendants in the Complaint are present or past presidents or trustees of certain of the railroads named as defendants in the Complaint, and that certain of such individuals are members of this defendant.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the Complaint.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the Complaint, except that it admits that Carl Byoir and Associates, Inc. is engaged in business as a public relations firm and has an office at 10 East 40th Street, New York, New York.

11. This defendant is advised by counsel and therefore avers that the allegations of paragraph 11 of the Complaint require no answer. Insofar as such allegations may require answer they are denied.

12. This defendant denies the allegations of paragraph 12 of the Complaint.

13. This defendant denies the allegations of paragraph 13 of the Complaint.

14. This defendant denies the allegations of paragraph 14 of the Complaint.

15. This defendant denies the allegations of paragraph 15 of the Complaint.

16. This defendant denies the allegations of paragraph 16 of the Complaint.

17. This defendant denies the allegations of paragraph 17 of the Complaint.

18. This defendant denies the allegations of paragraph 18 of the Complaint.

19. This defendant denies the allegations of paragraph 19 of the Complaint.

20. This defendant is advised by counsel and therefore avers that the allegations of paragraph 20 of the Complaint with respect to the truck weight limits of New York, Ohio, New Jersey, Delaware, Maryland and Pennsylvania involve the interpretation of statutory or regulatory provisions in the respective states, and as such, require no answer by this defendant. This defendant denies the remaining allegations of paragraph 20 of the Complaint.

21. This defendant denies the allegations of paragraph 21 of the Complaint.

22. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that an important consideration in Governor Fine's vetoing of Senate Bill 615 was the Maryland Road Test No. 1. This defendant denies the remaining allegations of paragraph 22 of the Complaint.

Further answering paragraph 22 of the Complaint, this defendant says that while Maryland Road Test No. 1 was one of the factors mentioned by the governor in his veto message, dated January 21, 1952, copy of which is attached hereto marked Exhibit "A", that factor, or any one of the factors mentioned therein would have justified the veto.

23. This defendant denies the allegations of paragraph 23 of the Complaint, except that it admits that Governor Fine vetoed Senate Bill 615 on January 21, 1952.

24. This defendant denies the allegations of paragraph 24 of the Complaint.

25. This defendant denies the allegations of paragraph 25 of the Complaint.

26. This defendant denies the allegations of paragraph 26 of the Complaint.

27. This defendant denies the allegations of paragraph 27 of the Complaint.

28. This defendant denies the allegations of paragraph 28 of the Complaint.

29. This defendant denies the allegations of paragraph 29 of the Complaint.

30. This defendant denies the allegations of paragraph 30 of the Complaint.

31. This defendant denies the allegations of paragraph 31 of the Complaint.

## Second Defense.

32. Venue of the action against this defendant is in the wrong district, because this defendant is an unincorporated association having its principal and only place of business and maintaining its staff in New York City, New York and does not reside in, is not found in, and has no agent in the Eastern District of Pennsylvania.

THIRD DEFENSE.

33. The court lacks jurisdiction over the person of this defendant because

(a) service of process was not made upon an officer, managing or general agent of this defendant or upon an agent authorized by appointment or by law to receive service of process on behalf of this defendant;

(b) this defendant is an unincorporated association having its principal and only place of business and maintaining its staff in New York City, New York and is not an inhabitant of and may not be found within Pennsylvania, and, therefore, was not and is not subject to service of process within the Eastern District of Pennsylvania.

FOURTH DEFENSE.

34. Service of process upon this defendant was insufficient in that such service was not made upon an officer, managing or general agent of this defendant or upon an agent authorized by appointment or by law to receive service of process on behalf of this defendant.

FIFTH DEFENSE.

35. The Complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE.

36. The plaintiffs are not entitled to bring this action on behalf of themselves and all others similarly situated.

SEVENTH DEFENSE.

37. The Complaint fails to set forth an action arising under the Constitution, laws or treaties of the United States and this court lacks jurisdiction of the subject matter thereof since the citizenship of the parties is not diverse.

EIGHTH DEFENSE.

38. The Complaint, particularly the allegations thereof relating to the "Fair Truck Bill", pertain to activities of the defendants which are protected by the Constitution of the Commonwealth of Pennsylvania and the Constitution of the United States of America which guarantee to the defendants the right of free speech and the right to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance. The relief requested in the Complaint seeks to interfere with these constitutional rights of the defendants to free speech and to petition for which reason, among others, the Complaint fails to state a claim upon which relief can be granted.

NINTH DEFENSE.

39. To the extent that plaintiffs, or any of them, have suffered any damage by reason of the enactment or failure of enactment of any laws in the several states or by reason of the vetoing of any bills in any states, such damages are the result of the sovereign acts of the respective state governments and are not cognizable in this action.

TENTH DEFENSE.

40. Plaintiffs come into this Court with unclean hands and are barred from obtaining injunctive relief or damages by their own illegal conduct. The Pennsylvania Motor Truck Association, on its own behalf and as agent of other plaintiffs, has waged and is waging a malicious campaign by publication and circulation of false and defamatory statements among the general public, public officials and customers of certain defendants, seeking to injure the defendants in their business and, by such false propaganda, to maintain for the plaintiffs an unfair competitive advantage over defendants through the continuation of discriminatory taxes and the relief of plaintiffs from the payment

of their fair share of the cost of construction and maintenance of the public highways.

ELEVENTH DEFENSE.

41. This action was instituted by plaintiffs in bad faith for the purpose of injuring the defendants through the allegation of false, malicious and defamatory statements and for the purpose of attempting to influence legislation, including particularly legislation at the 1953 session of the General Assembly of the Commonwealth of Pennsylvania. In conducting the action plaintiffs have caused to be filed both unsworn and sworn documents containing false and defamatory statements. Copies of these documents have been widely disseminated by plaintiffs for the purpose of generating publicity adverse to defendants. The institution of the action for purposes other than seeking relief from this Court and the conduct of the action in such a way as to make it the vehicle of false propaganda adverse to defendants constitutes an abuse of judicial process.

TWELFTH DEFENSE.

42. Defendants' activities have been in the public interest and cannot form the basis of a claim under the anti-trust laws.

Defendants' activities have consisted of bringing to the attention of the general public and appropriate state legislatures the facts, which plaintiffs have sought to distort and suppress, that heavy over-the-road trucks operated by plaintiffs and others, are causing enormous damage to the nation's highways and that such trucks do not bear their fair share of the cost of building and maintaining such highways.

Studies made by governmental authorities and independent research organizations establish that heavy over-the-road trucks, particularly those carrying axle loads in excess of 18,000 lbs., are substantially responsible for the destruction of the present highways. Such studies also

show that heavy over-the-road trucks require the expenditure of large sums of money for the building of new highways able to sustain the weight of such vehicles and for the repair and rehabilitation of present highways damaged by such vehicles.

Since plaintiffs and others operating heavy over-the-road trucks fail to pay for their proportionate share of the damage that such loads cause the highways over which they move, they are to that extent indirectly subsidized by the general public. Such subsidy to plaintiffs and other operators of heavy over-the-road trucks is being paid from taxes imposed upon the general public for the construction of new highways with standards exceeding those necessary for ordinary highway traffic and for the repair and maintenance of extraordinary damage to present highways caused to a substantial extent by heavy over-the-road trucks. The burden upon other taxpayers, including defendant railroads, whose tax payments are devoted to the construction, repair and maintenance of roads is proportionately greater than it would be if those whose vehicles carry such excess loads were required to pay their fair share of highway costs.

Plaintiffs and other users of large trucks, although operating only approximately 5% of the nation's freight carrying motor vehicles and 1% of the total vehicles using the public streets and highways, have sought to give the impression that they speak for all of the highway users including the operators of 8,700,000 small and medium size trucks and over 44,000,000 passenger cars, and have thus attempted to keep from the public and the legislatures information of the damage to the highways that they, a small fraction of the highway users, have caused and are causing, and to conceal the extent of the subsidy which they have received and are receiving.

Bringing to light these facts as well as facts with regard to consistent violations of the law limiting the weight and speed of heavy trucks which increase both the hazards on the roads and the physical damage thereto, is a legitimate

activity beneficial to the public as a whole and cannot form the basis for an action under the antitrust laws, for such action must be predicated fundamentally upon a disservice rather than a service to the public.

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*Of Counsel:*

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**EXCERPT FROM PRE-TRIAL HEARING OF MARCH 9, 1956 BEFORE HON. THOMAS J. CLARY, J. (IN CHAMBERS).**

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(17) Mr. Fine: Could you find out how many people you are going to take all together?

Mr. Price: All the rest of the plaintiffs.

Mr. Fine: Fifty?

Mr. Price: Whatever number it is.

The Court: If you saw from an examination of fifteen or twenty of them that you could not elicit from them any useful information for your purposes other than what you obtained in the interrogatories, would you still proceed to examine sixty-seven?

Mr. Price: There would be no assurance that the fifteen that I picked that were duds would be representative of the rest. I think I am entitled to know what each one is prepared to say.

Mr. Fine: They have said it in the interrogatories.

Mr. Kohn: They have given you the information at great pains to us and we objected to it.

The Court: I see a practial situation here rather than a legal situation. I think that the objections raised are to the time-consuming situation and not to any desire to limit you in information.

(18) Mr. Price: If they know nothing, the time factor will not be important. It doesn't take too long to find out that they don't know anything.

Mr. Green: Your Honor, they have answered under oath every question involved in this case in the very lengthy interrogatories which were filed on them, and I think you will agree that you have never seen a more voluminous set of

interrogatories since you have been on the bench. Now, what purpose can be served, except to harass these people, by bringing them from North Carolina and the other places where they are and simply have them repeat under oath the same thing that is already on the record?

Mr. Kohn: And we are not going to use them as witnesses on the conspiracy, and we are willing to so state of record. It is not a case of our holding under a cloak a witness so that you can't examine him and then we spring him on you at the tiral. We are not going to put these people on for that purpose. We are not trying to do anything like that.

Mr. Price: The examination of the plaintiffs that has already been conducted was along lines that the plaintiff's counsel are thoroughly familiar with. They had (19) answered interrogatories the same way. There was no objection made at the time.

Mr. Green: At the time you examined them you hadn't filed your interrogatories.

Mr. Fine: They were also officers of the P. M. T. A., mainly.

Mr. Kohn: We were willing to ride along with counsel two and a half years ago, but when we get down this close to the line, and people have other things to do, I think the accommodation that we were willing to give you then, it is just unfair to ask us to do now. We have only so many hours a day and so much strength and we can't do the impossible.

Mr. Green: By way of contrast, Your Honor, might I point out that we selected certain officials from the defendant railroads, and we were satisfied with our interrogation of them. We made no attempt to take the thirty-one railroads and say, "You must produce one man from every one of those," because we felt that we would only get repetitious matter from them, and then in an effort to be fair

about the thing we simply limited ourselves to the ones that we thought might know something about it. We didn't bring in a fellow from some little road up in (20) Canada or Maine simply to force him to come into New York and make a statement. I think they should take the same approach on it.

The Court: It is always a difficulty in the "big case," where you have multiple actions on the same cause of action. Would it be satisfactory to you, Mr. Price, to examine a certain number of these and have it stipulated of record that except as to a claim for damages, no officer, employee, or witness on behalf of an individual plaintiff will testify as to the conspiracy charged in this action, nor will any information supplied by any officer, employee, agent, or attorney of these individuals be used in the plaintiff's case in respect of the charge of conspiracy?

I don't know that the plaintiffs would be willing to enter into such a stipulation, but if a stipulation of that magnitude —and it is pretty broad—were to be given to you as respects a great number or the majority of these plaintiffs, would you be willing in that case to forego examination of these particular ones, in view of the shortness to the time of trial?

Mr. Price: That would not cover two important elements that occur to me at the moment. One is (21) the nature of the violations that each individual plaintiff may have been guilty of himself in respect to the weight limitations or the general illegality of their operation, which has been developed from a number of the plaintiffs, which has nothing to do with the conspiracy question.

The other question is, not the details of damage, but the general overall nature of damage, whether it was due to a weight limitation being in or a weight limitation being out or for some other cause, not the details of it, because I understand that we would not go into that at this time, at least until after we have had a chance to get the answers of

the twelve or a similar twelve who have been recently suggested; but those two elements I think we are entitled to information about now, and they would not be covered by this suggestion Your Honor just made, and I don't see how they could be.

The Court: Haven't they been pretty well developed in your interrogatories?

Mr. Price: No.

Mr. Kohn: Completely on the first subject, sir.

Mr. Price: Nothing on the subject of damages, because all these interrogatories on even the (22) broad aspects of damage were suspended.

The Court: That I recall, but didn't they have to reply as to violations?

Mr. Kohn: We did.

Mr. Fine: And we have also furnished a list of the twelve.

Mr. Kohn: On the weight limitations, I think you got much more out of the answers to the interrogatories than you may get out of a particular man. How in the world is he going to remember or know what weight violations there were, so that certainly as to that you have got the information.

The Court: My recollection is that I overruled objections and made them answer as to every violation.

Mr. Kohn: We did.

Mr. Green: And they have an answer which in some instances runs into a few pages.

Mr. Kohn: It is much broader than any executive could possibly give you on the stand; and as to the second, we had a procedure worked out here at some length, with Your Honor's guiding cooperation, so really it boils down to the fact that what he wants to examine about he already has.

(23) The Court: The point of my suggestion was this, that you may very well not use a person connected with, say, the Apex Trucking Company—and I am just using that as a nom de plume for some plaintiff who happens to be involved—but the Apex Trucking Company may have furnished you vital information which you will use in the nature of documents or something like that in your proof, and it may well be that it may be something that accidentally came into their possession. Now, certainly, you would discover that in preparation for trial, and if a thing like that were at the last minute sprung on the defendants here, they certainly would be put at a disadvantage by any ruling of mine stopping discovery on that particular point, but in the face of the stipulation, you would be stipulating that information right out of court.

Mr. Kohn: That is right.

Mr. Green: And we will agree to the stipulation.

Mr. Kohn: That is agreeable to us, sir.

The Court: That was my suggestion, Mr. Price, as a way to protect your rights of discovery, but the thing that bothers me is, can you get some evidence out of them that may help you in your defense? The defense is equally (24) as important in discovery as the prosecution. That is the part of it that worries me, and I would have to leave it up to counsel to think out. I think that is something that ought to be thought over, Mr. Price.

Mr. Price: I will be glad to.

The Court: I suggest that we do some thinking along that line, and I will make absolutely no ruling on this at all today. I will say to you, my inclination is that, on general practice, I would permit the examination of a responsible officer, partner, or individual in every case.

Mr. Green: No question.

The Court: That would be my ruling, and I would have no hesitancy in giving a rule like that today. I am not going to give it, however. If reasonably and without harm to either plaintiff or defendant we can come to some agreement to limit it, I see no harm done to the case, and perhaps we have expedited the matter somewhat, which I am trying to do, within limits, however. I would like you to think it over.

Mr. Price: I will do that in the light of the answers to interrogatories which have been filed. Some of them haven't been completed.

(25) The Court: Suppose we postpone further discussion about this until, say, Friday, a week from today.

Mr. Green: What I was going to suggest, Your Honor, was that we take this up after we complete the argument on the counterclaim. Could you fix it at that time?

The Court: I might have to consider that at length, and it may well be that that will run into two or three weeks more.

Mr. Green: Maybe I didn't make myself clear, Your Honor. What I meant was that after we finish the argument on the counterclaim, which is scheduled for the 20th, that then the same persons who are in attendance here sit down with you and see if you can reach any understanding as to this question of noticing additional plaintiffs.

The Court: You may have your answer before that, and it may be along the lines that we have been talking here this afternoon, so why delay it?

Mr. Green: You mean if Mr. Price agrees to your suggestion?

The Court: Yes.

Mr. Green: If he does, that ends it.

(26) The Court: He may or he may not, but I assume he would want to examine carefully the exact wording of my limitation, which will appear in the record.

Mr. Price: Surely.

The Court: And Mr. Schuman will have to get that out first.

Mr. Green: Could I make this suggestion, then, Your Honor, that Mr. Price study what position he wishes to take as to your suggestion. If he can reach a conclusion as to it, he will let us know and let you know, and we will decide whether that terminates it. If we can't, then let us meet after the argument on the counterclaim and thrash the thing over.

The Court: Or I will consider and rule on it at the argument on the counterclaim.

Mr. Price: At or shortly after, I think probably would be the better time, if an ultimate ruling is to be made, because this idea is a novel one. I don't know whether all the defendants represented would care to agree without a complete understanding of what was going on, so that perhaps we ought to have a more general discussion.

The Court: All right, then, I will let it (27) go until then. I am just trying this out as a practical suggestion and not as a legal ruling, but I have made a suggestion that I think is pretty broad in scope, and I think, except as to matters of defense, about which I would know nothing, of course, it would completely preclude the plaintiffs from using any material which they have gotten in the past or might in the future garner from these particular witnesses. I think that that would wipe them out of the case on the question of liability completely.

Mr. Kohn: That is, the witnesses that weren't called.

The Court: The witnesses that weren't called, and you would have to include every witness who does not submit

himself and every plaintiff who does not. If you intend to do it on every one of them, you better put your notices out now. I think Mr. DeLone ought to do that in the next several days and before the 20th, so that you notice every one that you intend to notice and so that any ruling I make will cover the whole situation. I may not have to make any ruling. It may be perfectly agreeable to everyone.

Mr. Price: There are a number of the plaintiffs (28) who would probably would fit into the category which Your Honor has contemplated by this stipulation. There are several, maybe half a dozen, who would not.

The Court: I would expect you to notice them. I would expect you to notice as many as you felt might have information and would not be included in the group that I have tried to describe.

Mr. Price: Yes.

The Court: I don't think that I can ever accurately describe any group.

Mr. Price: I wasn't sure as to the ones that you thought we should notice now. The ones that might be included within the stipulation?

The Court: I would notice every one of them.

Mr. Price: Everybody we can think of?

The Court: Everybody that you would intend under your present prospective procedure. You say that you would like a responsible individual from each.

Mr. Price: That is right.

The Court: You better notice one from each of them, because we are going to handle this, as I told you, on a rather informal basis, but the ruling will be strictly formal.

(29) Mr. Price: Yes.

The Court: I told you that we would handle it on a pretrial basis rather than written motions, argument list, and so forth, and this meeting will be part of the record in the case, so it won't be necessary for all of these present motions to be put down at a certain time. If we are going to expedite this case, we will have to handle it in this manner. While it is informal in nature, it is just as effective.

Mr. Green: Just as binding as a formal ruling.

Mr. Price: We have a record of it, surely.

The Court: So I would like you to think it over and see if, within the limits which the plaintiffs say they are perfectly agreeable to go along, we can expedite discovery.

Mr. Price: I would expect there were a number of the plaintiffs who were in this, shall I say, dud category. There are some of them I am certain are not, that couldn't be covered by the stipulation, because they took active part in various activities of the P. M. T. A., and so on.

The Court: I will say to you right now (30) that I would not under any circumstances put any restriction on the examination of those people.

Mr. Kohn: You may find you have taken some of those already.

Mr. Price: We have taken some already.

The Court: As to anything in that connection, I will say very frankly that I would strongly support your right to discovery, and I am quite sure the plaintiffs would have no objection, could have no objection, to it.

Mr. Price: So that we can list them or segregate them.

The Court: Suppose you do that, but I think for the purpose of the record——

Mr. Price: We can notice them all.

The Court: Notice them all, so that if it is necessary for a ruling on the protective side, the plaintiffs will then be in a position to have on the record that they objected to it and that I overruled them, if I did, or sustained them, and you would have your exception on the record on that particular point, because I think it is most important to preserve rights all the way through here, even at this early stage.

Mr. Price: I should hope to be able to (31) indicate to you at that time which were in the two categories.

The Court: That would be very helpful if you could.

Mr. Price: I will try to do that.

The Court: Then we will get it taken care of in one order.

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## EXCERPTS FROM DEPOSITIONS WHICH WERE NOT OFFERED IN EVIDENCE.

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### EXCERPT FROM DEPOSITION OF WILLIAM M. PRITCHARD.

(711) WILLIAM M. PRITCHARD, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Mr. Pritchard, what is your address?

A. 21 North Marshall Street, York, Pa.

Q. And what is your present business?

A. I am vice-president of the Coastal Tank Lines, York, Pa.

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(771) Q. But is there any limitation presently existing in Pennsyl- (772) vania, or that has existed for any period of time, which does you any damage that couldn't be cured or couldn't have been cured by the adoption, the passage and approval of the 1951 truck bill?

A. Well, that is the crux of the whole situation—uniformity between these various states.

Q. Suppose the 1951 bill had been passed and approved instead of vetoed; would that have cured all your troubles so far as the damage that you are talking about is concerned?

A. You mean the suit here?

Q. Yes.

A. Well, I would say generally yes.

Q. Do you know of any exception?

A. No.

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## EXCERPT FROM DEPOSITION OF HARRY L. GORMLEY.

(798) HARRY L. GORMLEY, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Mr. Gormley, you have been sworn?

A. Yes.

Q. Will you give us your full name and address?

A. My name is Harry L. Gormley, 236 Fairfield Avenue, New Castle, Pennsylvania.

Q. What is your business, Mr. Gormley?

A. I am President of the Keystone-Lawrence Transfer and Storage Company at New Castle, Pennsylvania.

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(961) By Mr. Price:

Q. I think we passed newspaper columnists.

In paragraph 26 of the Complaint there is the averment that the suppliers and customers of the plaintiff were approached by Byoir for purposes of disparagement. What do you mean by that, Mr. Gormley? Were any suppliers and customers of your company approached by any Byoir agents?

A. The members of the Pennsylvania Federated Women's Clubs, the wives, some of the ladies, the wives of some of our customers through the Women's Clubs, yes, they received that information.

Q. Well, is the women's club a supplier or customer of
(962) yours?

A. The members' husbands are customers and suppliers in some cases.

Q. Oh. This was an indirect approach through the distaff side, was it?

A. Not too indirect. After all, when the wife of a supplier is told these things it normally goes to the husband, or if it is the wife of a business man it many times goes to him.

The people who live in the townships from the stuff they were getting from the second-class townships, the Pennsylvania Supervisors Association, many of those people are connected with our customers.

Q. Well now, this averment says that Byoir approached suppliers and customers of the plaintiffs.

A. Many of the——

Q. Do you know any suppliers or customers of your company——

A. Going back——

Q. —who were approached by Byoir?

A. Going back to what I was stating a minute ago, the Grange people also, many of them, are our customers, who were getting this information.

(To the reporter) Will you state Mr. (963) Price's last question please?

Q. Well, the averment in the Complaint is that Byoir approached suppliers and customers of the plaintiffs and disparaged the plaintiffs to them. Are there any customers or suppliers of your company who were approached by Byoir?

A. No.

Q. If so, which ones?

A. Except in the indirect basis which I have stated.

Q. That is through the women's——

A. Various organizations.

Q. Through the women's clubs?

A. Township Supervisors, Grange, and so forth.

Q. So that it was indirect?

A. Right.

Q. There were none that were approached directly that you know of?

A. Not that I know of.

Q. In Paragraph 28 it is averred that the plaintiffs were impeded in their business. In what respect was your company impeded in its business?

A. Well, there were many ways that we would be impeded. The defeat of 615, of course, would cause us to use four trucks or five trucks where normally three would be (964) sufficient if we had received the increased weights provided in the Bill; the fact that in Pennsylvania we have to use what we call a single-axle trailer, which in surrounding states can haul probably 22,000 pounds; and the tandem, we cannot use the tandem, which is legal in the surrounding states. In those states the tandem can haul 35 to 37,000 pounds. In Pennsylvania with that type of equipment we can only load about 22,000 because the equipment is heavier. Therefore, if we went out of Pennsylvania we had equipment which could not haul the payload that could have been hauled on the equipment we would have used if 615 had become law, necessitating four trucks and probably some-

times five trucks to do what three could have done with the modern type of equipment which has been developed during the war and since the war years.

Q. Anything else?

A. Well, that follows through on the basis that when you can't haul the type of payload that is being transported in all of the other states surrounding us and in many other places in the nation we are not in a position to meet many of the rail rates which have been reduced in the past short period of time and over a longer period of time.

(965) Q. Well, then, would it be fair to say that the impeding that is referred to in that paragraph 28 of the Complaint could all have been cured by the passage of 615?

A. No, I don't believe that is correct. Much of the false propaganda that has been put out against us has impeded our reputation. It——

Q. I am referring to impeding your business now.

Mr. Dilworth: Let him finish.

Mr. Price: I wasn't asking about his reputation. Impeded in your business.

A. All right, our business reputation.

By Mr. Price:

Q. Well, how did it impede it?

A. By people not being as interested in giving us business as they would have been if we hadn't been maligned, vilified and all the nasty things said about us and the pictures printed about us, and so forth.

Q. When you say "us" that isn't your company, it is just the truckers?

A. It is my company and the industry.

Q. Was your company singled out for any particular vilification or criticism?

(966) A. Just as a part of the industry, which——

Q. Was your company ever named alone or at all?

A. The company was never named alone, no.

Q. It was never named at all?

A. That is right.

Q. Now, in the impeding of your business can you point to any specific single instance in which you lost any business as a result of any of this campaign?

A. Yes, we have lost business because, as I said, we couldn't move the payload that could be moved with other types of equipment. Consequently, we couldn't meet the rates.

Q. Well, that could have been cured by 615.

A. Yes, that could have been cured by 615.

Q. Now, have you lost any business that couldn't have been cured by 615?

A. Well, that is pretty much an intangible factor. When bad things are said about people any type of business is hurt.

Q. Yes, but are you able to point to any particular customer or any particular business that you lost as a result of that? If you can I would like you to give me the name.

A. No.

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## EXCERPT FROM DEPOSITION OF JAMES E. CRASS, III.

(988) JAMES E. CRASS, III, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Mr. Crass, will you give me your full name and address?

A. James Edward Crass, III, 1701 North Washington Avenue, Scranton, Pa.

Q. What is your business?

A. I am the President of Seaboard Tank Lines, in the business of transporting petroleum and petroleum products in bulk in tank trucks.

* * *

(1026) Q. Mr. Crass, in view of the source of your information about the various averments to the Complaint, I have very few questions to ask you on that subject, but I will ask you whether you can tell me whether any suppliers (1027) or customers of yours, that is, your individual company, were ever approached by Byoir or Byoir's agents, to your knowledge, for the purpose of disparaging your company or anything else?

A. Suppliers to my company?

Q. Suppliers or customers of yours. I am speaking now of your individual company, your own company as distinguished from the P. M. T. A.

A. No, sir, I do not know of any.

Q. And do you know whether your company has in any way been impeded in its business by anything done by Byoir or any of the defendants?

A. Well, indirectly.

Q. In what respect?

A. Well, through the defeat of 615.

Q. In any other way? 615 was an industry operation or had a general effect on everybody in the industry, of course.

A. That is true.

Q. But was there anything peculiar to your company that was not caused by the defeat of 615?

A. Not by Byoir, no.

Q. By any of the defendants?

A. Yes.

(1028) Q. Which ones or which one?

A. I recall an incident of the Erie Railroad, I believe. We had run from——

Q. Could you give us approximately when this was?

A. I believe in the early part of last year, 1952. We served a community in northeastern Pennsylvania known as Susquehanna, where we hauled petroleum products for the Esso Standard Oil Company from Bayway, New Jersey, to Susquehanna, at a fixed rate—I don't recall exactly what

the rate is now. The Erie Railroad came in and gave a drastic price reduction on the same run, a rate out, even though they weren't doing any of the business, and——

Q. You mean they hadn't been hauling any petroleum?

A. They hadn't been hauling from that particular source.

Q. Can you give me the point of origin and point of destination?

A. I just did—Bayway, New Jersey, to Susquehanna, Pennsylvania.

Q. Oh, yes, yes, excuse me.

Q. And this was done in spite of the fact that the Esso Standard Oil Company would have rather had the products put in there by truck. They cut the rates. So, in order to justify the product continuing to be shipped by truck, we had to lower our rate to meet it.

(1029) Q. Was that rate ever challenged before the ICC?

A. Yes, sir.

Q. By you?

A. Yes.

Q. Anybody else? Did any others join you in the proceedings?

A. I believe there were others in that proceeding.

Q. What did the ICC do?

A. They granted the rate decrease.

Q. They approved the decreased rate fixed by the Erie?

A. Yes, sir.

Q. And that is still in effect?

A. Yes, sir.

Q. Now, is there any other way that you recall that your company was impeded in its business?

A. No, not a direct way, Mr. Price.

Q. Well, by indirect, you mean Bill 615?

A. Yes, sir.

Q. I am excluding Bill 615.

A. And then of course the intangible thing that it is very difficult to put your hand on, the thing of just generally

telling the public what terrible people the truckers are and how irresponsible they are, and they (1030) are not nice people and they don't pay their taxes and they don't pay their way and they overload, and they are careless on the highways. Those are the things that you never know what business you lost because of, because of what has——

Q. Can you point to any loss of business as the result of it?

Mr. Green: Why don't you let him finish?

Mr. Price: I thought he had.

The Witness: I am trying to say, Mr. Price, it is a case there that the man never comes to you and says to you, "The reason I am not shipping by you is because I have heard bad things about you." He just doesn't do business with you. If the story gets around that a certain banker is not a particularly good banker, you don't go in to him and say, "I am not doing business with you because I heard bad things about you." You just go to another bank to do business; so, I say I can't put my finger on these things but I do believe they have existed, they have happened.

Q. Then, except for this rate decrease by the Erie, and except for the veto of 615, there isn't any damage, money damage, that you can point to that your company has suffered, is there?

(1031) A. Not specific.

Q. By "specific," is there or isn't there, that you can point to?

A. No, sir. I said that.

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## EXCERPT FROM DEPOSITION OF JOSEPH DAVIDSON.

(1418) JOSEPH DAVIDSON, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. DeLone:

Q. Mr. Davidson, what is your full name?

A. Joseph Davidson.

Q. What is your business?

A. Trucking business.

Q. With what firm?

A. Davidson Transfer and Storage Company. I am the president of Davidson Transfer and Storage Company.

Q. Where is that company located?

A. Headquarters in Baltimore, Maryland, 6201 Pulaski (1419) Highway.

* * *

(1438) Q. Now, it is alleged in paragraph 28 of the complaint that, as a result of the acts of the defendants, the plaintiffs have been impeded in the conduct of their business. Has your business been impeded as the result of the acts of the defendants?

A. We have been harmed, if that is what you refer to as being impeded, in that——

Q. I am just reading you the language of the complaint, which you read yourself.

A. I would say yes in answer to that question.

Q. How have you been harmed?

A. In this repect: In the states in which we operate, we have weight limits that are anywhere from 3½ to 7 tons more carrying capacity than we are allowed in Pennsylvania, and to that extent we are losing revenue on (1439) every unit we operate into Pennsylvania, and to that extent we are very much harmed. In addition to that, we are not in a position to compete with other media of transportation because other media of transportation—I specifically have

in mind the railroads—can and do publish rates, incentive rates, because of their ability to carry more weight, I presume, than we can over the highways, necessitating the use of additional equipment which we wouldn't otherwise have to use if we had a greater weight limit.

Q. Is it fair to say that, so far as you are concerned, the harm that your company has suffered is entirely because the Pennsylvania weight limit is 45,000 pounds and hasn't been raised from that limit?

A. That is right.

Q. And you have no knowledge of any of the specific allegations of the complaint. You seek to attribute that harm to the defendants, do you?

A. I attribute that to anyone that would stand in the way of increasing the weight limits in a state the size of Pennsylvania, when the surrounding states have much greater weight limits, whatever they may be.

Q. Then, you attribute it to the Governor when he vetoed the bill; is that right?

(1440) A. Well, whoever was responsible for—whoever caused him, rather, to come to the conclusion which he did, which he has a perfect right to do, I presume, as the state executive.

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## EXCERPT FROM DEPOSITION OF TED V. RODGERS, JR.

(1467) TED V. RODGERS, JR., having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Give us your full name and address.

A. Ted V. Rodgers, Jr., Scranton, Pennsylvania.

Q. Mr. Rodgers, you are the son of Ted V. Rodgers, Sr.?

A. That is right.

Q. Who is also in the trucking business and has been referred to here before by some of the other witness?

A. That is right.

Q. And you have been here for a day or two, or just yesterday?

A. I have been here for the last three weeks.

Q. Oh, well, you are very familiar then with what has been going on. Have you got a list of the officers of your company available?

A. Not with me, but I can furnish them.

Q. Will you do that by letter to Mr. Dilworth and then he will send it to me.

A. Yes, sir.

Q. That is, the names and addresses of all the officers.

What is the name of your company?

A. Rodgers Motor Lines, Inc.

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(1485) Q. Anything on those things?

A. Although I do know that as far as the Federation of Womens Clubs, my wife was very active and had to get out of it. After all, she belongs to the trucking industry.

Q. I am sorry, I didn't hear the last. She had to get out?

A. Yes, because she belongs in the trucking industry and they had this speaker from—I don't know exactly where she was from, but she was very much against the trucking industry.

Mr. Dilworth: Bessie Q. Mott?

The Witness: I don't know whether it was or not.

By Mr. Price:

Q. Did she tell you her name? It was a woman speaker, was it?

A. That is right.

(1485-A) Q. And she was too much for your wife and she quit the Women's Club?

A. That is right.

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(1486) Q. Mr. Rodgers, you don't know who the woman was who addressed the League of Women Voters?

A. No, I don't.

Q. Your wife didn't stay to find out? As soon as she opened up on the truckers then your wife left?

A. Yes.

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(1487) Q. Has your company been impeded in its business in any way by anything done by any of the defendants?

A. Yes, it has in so far as—well, specifically right in the City of Philadelphia here we enjoyed a movement of freight from a pier, it was import canned goods, and we were moving the stuff to the A & P Tea Company in Scranton, Pa.

Q. Which company?

A. A & P Tea Company, in Scranton, Pa., at a rate of 36 cents per hundred with a minimum weight of 25,000 pounds and the railroads filed a rate of 29.9 and a minimum weight of 36,000 pounds.

(1488) We could have met the rail rate, but we could not haul 36,000 pounds so we lost the business.

Q. Then——

A. Also,——

Q. Excuse me, were you going to say something?

A. Also, we move a lot of steel out of the Buffalo area, the Niagara Frontier, and we use four units to haul the steel on. If we had added weight in Pennsylvania we could use only three units.

Q. Let's take the Philadelphia situation first. There you said you lost business to the railroads because they reduced their current rate.

A. That is right.

Q. Was that a Pennsylvania intrastate rate or an ICC rate?

A. It was both intra- and interstate.

Q. Did you object to the rates?

A. Yes, we did.

Q. What happened?

A. The case is still pending, as I understand it. I am not sure of that.

Q. Well, so far as the rates are concerned, they are now under consideration by the PUC and the ICC, or——

A. That is right.

(1489) Q. —just one of them? By both of them?

A. By both.

Q. By both; and you have some objection pending before both Commissions which is still undetermined?

A. Well, we requested investigation of the canned goods rate.

Q. But whatever investigation has been started hasn't yet been finished, is that it?

A. That is right. Not specifically.

Q. Do you know of any suppliers or customers of your company that any of the defendants approached and disparaged you or your company to them?

A. Not specifically, but I don't know how I would know. I mean, if they approached shippers and disparaged us in any way the shippers would certainly not come and tell us.

Q. Well, he might or he might not.

A. I doubt whether they would.

Q. But the question just is whether you know of any such instance.

A. No, I don't,

Q. So I assume, therefore, that none of your customers or suppliers did report any such disparagement to you, did they?

A. Not that I know of.

(1490) Q. What damage, if any, in addition to what you have mentioned, has your company suffered by virtue of anything done by the defendant or any of them?

A. What damage?

Q. Yes. We spoke about being impeded and I didn't know whether you were using that in a broad sense to cover all damage done to your company or not. Is there any other damage that you can point to that resulted to your company as a result of anything done by the defendants, or any of them?

A. No, nothing specific outside of the fact that they certainly, in their campaign, have hurt us with the shipping public. How much we can't very well determine.

Q. Your gross has increased, has it not, in the last year or two?

A. It increased in '52. 1953 is remaining fairly constant.

Q. Well, we only have a part of '53 to measure.

A. Yes.

Q. But it was better in '52 than it was in '51, wasn't it?

A. Yes, it was.

Q. How about '51 over '50?

A. There was a slight increase in '51 over '50. Of (1491) course, that is more or less not the fact that we increased our business, we just increased our operating territory, we just opened up territory that we had the right to serve but did not serve outside of our truckload business, and that is what increased our gross business.

Q. So you expanded your operating territory?

A. That is right.

Q. Did you add to the number of trucks that you had, the number of units?

A. Yes, we did.

Q. So you had a general expansion in that year. Was that in 1951, or did you start it in 1950?

A. We started in 1950.

Q. And it began to take effect in 1951, is that right?

A. That is right.

Q. Had you had any material change in your operating area prior to 1950?

A. No, and of course our operating authority has not changed, we have the same certificate we have had since the beginning of the company, and of course the certificate we acquired in 1946. But we just opened up territory that we only served on a truckload basis and we are now serving (1492) with both truckload and less than truckload.

Q. I understood you didn't increase your authority but you increased your area of operations within the authority you have always had.

A. That is right.

Q. But was there any material change in that from the time you got the authority in '46 until you made the change in 1950?

A. No.

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(1518) By Mr. Ingersoll:

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(1521) Tell me,—I don't mean to be too personal, but it is interesting about your wife and the Women's Club. Did I understand it that she found such an anti-truck atmosphere in this club that she felt constrained to resign?

A. No, she didn't resign from the club, she left the particular meeting. The meeting as to see whether or not they would join the Federation. They didn't.

Q. There was a group of ladies together making up their minds whether they would join the Federation?

A. That is true.

Q. And then a speaker came, eh?

A. (Witness nods head.)

Q. And started to speak about the trucking industry?

A. Oh, she spoke about the Federation of Women's Clubs in the beginning. I was not there myself, I couldn't say exactly what she said, but she then started to talk about the trucking industry and my wife naturally left.

Q. Everybody else leave?

A. No.

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## EXCERPT FROM DEPOSITION OF CHRIST N. KARN.

(152) CHRIST N. KARN, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Will you give your address also, Mr. Karn?

A. 345 West Elm Street, Hazelton, Pa.

Q. Will you tell us your business experience, Mr. Karn?

A. Well, I have been in the trucking business since June the 1st, 1915 and all the way through, that is about all I can say about it.

Q. Always the same company?

A. How is that?

Q. Always the same company?

A. Well, yes, it was the same, only it used to be called Karn's Transfer, but now it is a corporation, Karn's Transfer, Incorporated.

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(1543) Q. Now, can you point to any case in which any supplier or customer of yours was approached by Byoir or anybody representing Byoir, and told stories about you, bad stories?

A. No, I can't point to any particular case, no.

Q. Did you ever hear of any such case?

A. No, I didn't.

Q. Can you tell any instance in which your business was impeded by anything done by the defendants or any of them?

A. Well, it was—as I say, the main thing was that it was giving us such a bad reputation.

Q. Was your business impeded in any way that you can point to?

A. The only thing that was impeded was on our tonnage basis, that way, if that is what you mean.

Q. I don't know. Anyway at all that occurs to you that your business was impeded by anything that the defendants did.

A. I don't know just—the only thing I can say or that I can see was that we were held back, if you want (1544) to put it that way, by not being able to haul our gross tonnage of what we should be hauling in there. We were impeded very much that way.

Q. That is because the weight limits in Pennsylvania weren't as high as you would like to have them?

A. That is right.

Q. But that would mean you would have to have a change of the Pennsylvania law in order to let you haul this additional amount?

A. Yes, that is right.

Q. Were you impeded in any way except by the laws of Pennsylvania, imposing this limitation on the amount of weight you could carry?

A. To my knowledge right now, no, I don't know of anything else in there, except the restrictions on the weights.

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## EXCERPT FROM DEPOSITION OF EDWARD S. KRAMER.

(1573) EDWARD S. KRAMER, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Mr. Kramer, would you give us your full name and address, please?

A. Edward S. Kramer, K-r-a-m-e-r, 14648 Greenview, Detroit, Michigan.

Q. Will you tell us your business experience, please?

A. My business experience has been varied. I am familiar with motor transportation business as well as

service of motor vehicles, sales of motor vehicles, sales of real estate, designing of terminals, construction of terminals, pretty much of a jack-of-all-trades in connection (1574) with the Kramer Brothers Freight Lines.

Q. Well, have you always been associated with Kramer Brothers Freight Lines?

A. Since 1936 on a full-time basis.

Q. That is the name of your company, isn't it?

A. Kramer Brothers Freight Lines, Inc., yes.

Q. That is incorporated where?

A. In Detroit, Michigan.

Q. A Michigan company?

A. A Michigan corporation.

Q. What is your connection with that company?

A. I am president.

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(1601) Q. That made it impossible for you to carry as much in Pennsylvania as you would have been able to if that bill had gone through?

A. That is correct. And in that regard, we did, within two months after the veto of that bill, purchase 100 single-axel aluminum trailers with magnesium floors for our operations through Pennsylvania, and those were at a cost of about $400,000. Had that weight law gone through, we would have been able to haul about 10,000 pounds more freight per unit, with very little additional cost. Those 10,000 pounds per unit—and we are one of the biggest users of the (1602) Pennsylvania Turnpike, moving some 200 loads a day across Pennsylvania, and we do pay some $300,000 to the Pennsylvania Turnpike each year to operate over that road.

At our average rate of $1.50 a hundred, taking those 200 trailers and 10,000 pounds on each unit, a movement of 200 units a day and the overhead, it would mean approximately a $7,000,000 gross potential in business as far as Kramer Brothers Freight Lines is concerned.

Q. That is, if the weight bill had gone through, you would have been able to make $7,000,000 more on your existing equipment?

A. That is right.

Q. And that is just on your Pennsylvania business?

A. No.

Q. I mean the business going through Pennsylvania.

A. Through Pennsylvania and within Pennsylvania.

Q. Yes. But it wouldn't affect any of the business that you had outside of Pennsylvania? It was either on freight for delivery in Pennsylvania or freight that was going to pass through Pennsylvania from one border to the other, is that correct?

A. That is right. I am considering the 200 units (1603) a day we operate across Pennsylvania each day.

Q. When you say "across," that means from one border to the other, straight through without stopping?

A. Or it could mean from Philadelphia to Pittsburgh. That is pretty close to a border, too.

Q. That is what I was thinking about. It is either from Philadelphia to Pittsburgh or it is from some place in Ohio to some place in Jersey or beyond?

A. That is correct.

Q. Now, the $1.50 a hundred—what is that?

A. That would be the portion of the revenue that, pro rata on the mileage, is our system average rate.

Q. Would that be—let's see if I understand it correctly. You would get $1.50 for every hundred pounds you hauled from the western border of Pennsylvania to the eastern border, is that it?

A. That is right. No, I am sorry, let me correct that. That would be the true revenue. The potential for Kramer Brothers would be $7,000,000 more if we weren't restricted to the Pennsylvania weight limit, and had we had the higher limit it would enable us to haul 10,000 pounds more on each unit in our overhead territory.

Q. But the $1.50 a hundred, I am not quite sure how (1604) that operates. Is that the $1.50 a hundred for how many miles, 300 miles, the length of Pennsylvania?

A. No, that would be more. I correct myself on that. It would be from the eastern seaboard points to points in Ohio, Michigan, Illinois.

Q. The $1.50 is the freight from the eastern seaboard to the ultimate destination?

A. That is right.

Q. Overall?

A. Yes.

Q. So that the Pennsylvania haul would be a part of that, something less than the $1.50 a hundred?

A. But the freight movement that I am speaking of is actually an overhead movement.

(1605) Q. I understand.

A. It is a movement from the East to the West through Pennsylvania.

Q. That is right.

A. And if we can't haul it through Pennsylvania we can't haul it the rest of the way, so we are talking about the overall revenue.

Q. That is right, sure. But I just wanted to make it clear that the $1.50 is more than the actual pro rated revenue across the State of Pennsylvania.

A. That is correct.

Q. The $1.50 is the total rate from we will say Jersey City to some place in Ohio?

A. That is right, it is the average of rates in the overhead territory that we now—of the commodities that we now haul.

Q. Yes. So 10,000 pounds would be $150 more revenue, wouldn't it, at that rate? Is my arithmetic correct?

A. If your arithmetic is correct, that is correct.

Q. Well, you are a trucker, Mr. Kramer, you ought to be able to do those things a whole lot faster than I can.

Well, we will assume that that is right. That then would be $150 more revenue for 10,000 pounds on that kind of a haul.

(1606) Now, on these aluminum jobs that you bought, how much additional weight did they give you, additional weight for the payload, I mean?

A. Against a heavier trailer, those trailers weighed, if I recall correctly, about 6800 to 7,000 pounds. They vary in between themselves one hundred pounds or so even though they are a light unit, and against the older type single-axle trailers, that would weigh nine, ten, eleven thousand pounds; also, against any tandem equipment that may be pressed into service that could handle a lesser volume due to the increased weight of the tandem trailer.

Q. Well, could you say on the average how much additional payload you got out of using this lighter equipment per unit, per trip?

A. Well, the difference would be the difference in weight of 6800 pounds to the weight of——

Q. Would it average four thousand pounds?

A. I would say four thousand pounds average, yes.

Q. So that you were able to salvage four out of the ten by a different type of equipment?

A. That is right, and a huge investment.

Q. Sure, you have to make an investment in any equipment, I guess.

Do you use that lighter equipment anywhere (1607) else, too, outside of Pennsylvania?

A. No, it is primarily used in the overhead operation because it isn't practical to send a single-axle trailer in between points like Detroit and Chicago or Detroit and Cleveland, and points in the West where we can take and utilize tandem equipment and can take and haul 32,000 pounds legally in those States.

Q. Well, now that is one way in which your company was impeded. Can you name any other?

A. Well, the most recent ... dent was here just yesterday at this meeting I mentioned having last night with the managers. Our Philadelphia manager informed me that the rate on the product from Socony Vacuum in Paulsboro, New Jersey going to McKees Rocks at Pittsburgh, a business that we have enjoyed for the last ten years,——

Q. Is that tank business or——

A. It is a drum stock.

Q. You don't have to have tank equipment for it?

A. No, it is not a tank item.

The rate was 59 cents, and the rails came through here April 25th and put in a 35,000-pound minimum weight, which isn't practical to handle on any equipment in Pennsylvania; it is legal to start with, makes it impractical for us to compete, and along with it they reduced (1608) the rate to 46 cents.

Q. Had you been hauling that freight before?

A. We had been hauling it for the past ten years, as I said before.

Q. Did you haul it all, did you have a monopoly of that business?

A. No, we do not. It is a service that we have given that rates are comparable with other carriers and yet the only thing we have to sell is service, and if we don't give it we don't have the business.

Q. Did you share that business with other truckers?

A. It could have been possible. I don't know, I am not in a position to answer that question now.

Q. Well, I was wondering if you had it all or whether you divided it with somebody else. You wouldn't know that?

A. I wouldn't know that.

Q. But then the railroads reduced this rate just last month, you say?

A. That is right.

Mr. Dilworth: Not last month.

A. No.

Mr. Dilworth: The 25th of April.

A. Just a couple days ago, April 25th.

(1609) By Mr. Price:

Q. Oh, the 25th day of April, this month, then.

A. And we were notified by Socony Vacuum's traffic manager, or Bill Lutz, our terminal manager here in Philadelphia was notified yesterday that we would take and lose approximately a million pounds a month to The Pennsylvania Railroad effective with this rate reduction.

Now, if we had the increased weight limit in Pennsylvania, had the bill not been vetoed, it would have been practical for us to meet the 46-cent rate and we would have been able to haul 32,000 pounds and 35,000 on ideal equipment and we could have met that competition. But due to the weight limitation it isn't practical for us to haul this truckload traffic at the 46-cent rate and it isn't—well, it would be a loss, actually, to try to handle it.

Q. All right. Now, is there anything else that you can point to which has impeded your business?

A. Well, there has been some vilification of the industry and any vilification to the industry would mean harm to me or to my business.

Q. What vilification?

A. Well, from what has been written in the papers, any half-truths or false remarks that may be slanted or cast (1610) reflection on our industry certainly isn't good for it as it wouldn't be good for any other industry if remarks or anything was done to defame it in any way.

Q. Can you point to any such statements in the papers or magazines or other things? Can you name any of these that occur to you?

A. I can't right at the moment, no.

Q. Were you just speaking of general statements?

A. That is right.

Q. You can't recall any particular one that sticks out in your mind that you can refer me to?

A. No.

Q. Has your company been damaged in any other way in addition to the three that you have mentioned, by anything done by the defendants?

A. I can't recall at the moment.

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## EXCERPT FROM DEPOSITION OF CLEM L. PALEVICH.

(1942) CLEM L. PALEVICH, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Price:

Q. Mr. Palevich, will you give your full name and address for the record, please?

A. Clem L. Palevich, 1704 Green Ridge Street, Dunmore, Pennsylvania.

Q. And with what company are you connected?

A. Fowler & Williams, Inc.

Q. What is your connection with that company?

A. I am secretary, assistant treasurer and general manager.

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(1995) Mr. Kohn: Gentlemen, I was wondering—and quite seriously wondering, and wanted to suggest—in view of the depositions you have taken today, and the fact that this is obviously costing you more than it's costing us, and in all probability, at least, there's a possibility that we shall recoup our costs, I was wondering whether we couldn't enter into a stipulation that if the other gentlemen whom you have designated to appear here were (1996) questioned—that their answers would be substantially in

the same vein, and we could dispense with further depositions.

Now, we have other people available, as you see, and I'm just wondering if it's really profiting anybody and whether you haven't taken a fair enough sampling.

It seems to me that you've got the sort of sampling that you sought to get by your stipulation, and I think now we have it in more detail—the sort of thing we were discussing when we were talking this matter over with Judge Clary, and you have now got, in broader language, what you were trying to achieve.

If we could now stipulate that the answers are substantially the same, or that the answers are typical, and call it a day——

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(2003) Mr. Price: I hadn't understood until this moment that the claim was being limited to that, because a lot of these questions I have asked were designed to explore surrounding territory, and I'm quite sure that if my present understanding is correct, that the only damage that is being claimed is that which resulted directly from the inability of these various plaintiffs to carry more than the Pennsylvania law permitted, then it is certainly going to very much diminish the inquiries that we would be interested in making, and quite conceivably, eliminate most of these depositions.

Mr. Kohn: I would think so.

Mr. Price: Is my understanding in that regard correct, so that I can——

Mr. Kohn: Your understanding of my understanding (2004) is correct. I would want, finally, before we put it on the dotted line, to check with Bob and Aaron, who have been in this thing much longer than I, but you have correctly stated what my understanding of the situation is.

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**STIPULATION AS TO CERTAIN FACTS AND AGREEMENT AS TO SCOPE OF DISCOVERY (COURT PAPER NO. 460 FILED MAY 17, 1956).**

Subject to the approval of the Court, it is hereby stipulated by and between counsel for plaintiffs and counsel for defendants as follows:

Plaintiffs agree that:

1. No plaintiff (except plaintiff Pennsylvania Motor Truck Association) nor any of its directors, officers or employes personally observed any of the acts which are the subject of the allegations of paragraphs 7 and 12 to 27 inclusive of the complaint and, therefore, no such plaintiff or its directors, officers or employes has any personal knowledge of the acts which are the subject of said allegations.

2. No plaintiff (except plaintiff Pennsylvania Motor Truck Association) has paid any counsel fees or expenses in connection with this suit, except as stated in paragraph 4.

3. The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955.

4. Since 1949 plaintiffs (except plaintiff Pennsylvania Motor Truck Association) have supported the activities of the Pennsylvania Motor Truck Association by making contributions to the cost of such activities and none has objected to any such activities.

5. At the trial no evidence will be offered in support of the complaint concerning any incident involving or relating particularly to any particular plaintiff (except plaintiff Pennsylvania Motor Truck Association), its directors,

officers or employes, unless such plaintiff's deposition has been taken either individually or through an officer of the company, except upon the issue of damages as defined by paragraph 3 of this stipulation. This paragraph shall not preclude the offer of evidence in support of the complaint concerning any incident involving or relating generally either to the trucking industry or the plaintiffs.

6. At the trial no director, officer or employe of any plaintiff (except salaried officers and employes of plaintiff Pennsylvania Motor Truck Association and other officers of Pennsylvania Motor Truck Association whose depositions have already been taken by defendants) will be called as a witness in support of the complaint except as to the issue of damages as defined by paragraph 3, nor will any document in the possession or control of any such plaintiff be offered in evidence in support of the complaint except with reference to such damages, unless such plaintiff's deposition has been taken either individually or through an officer of the company.

Defendants agree that they will not take the depositions of the following named plaintiffs, their directors, officers or employes before trial, and any other plaintiffs who file answers to interrogatories prior to June 1, 1956:

Akers Motor Lines, Inc.
D. F. Bast
A. W. Bauman, Jr. Trucking Company
G. C. Braden Trucking Company
Ed. Chadderton Trucking
Cooper-Jarrett, Inc.
C. W. Dillie
Eastern Freight-Ways, Inc.
Fischbach Trucking Company
Friedman's Express
Hall's Motor Transit Company
Edward G. Horn Trucking Co.
Lansdale Transportation Co., Inc.

Lombard Bros. Inc.
F. W. Lusk Transfer Company
Martin Bros.
Martsolf Bros.
W. J. McCormick Truck Transportation
Miller Motor Express, Inc.
Lester C. Newton Trucking Company
Pennsylvania Transfer Company
Suwak Trucking Company
Yale Transport Corporation

This paragraph shall not preclude the defendants from taking the depositions of such plaintiffs, their directors, officers and employes on the issue of damages only, prior to the offer of any evidence concerning the alleged damage to any of such plaintiffs, but no such depositions shall be taken until after such plaintiffs have been served with and given a reasonable opportunity to answer interrogatories on the subject of their damages, and then only if the defendants deem such depositions necessary, subject however to the provisions of F. R. C. P. 30(b), bearing in mind the scheduled trial date of October 1, 1956.

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HAROLD B. BORNEMANN,
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MONTGOMERY, MCCRACKEN, WALKER & RHOADS,
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SAUL, EWING, REMICK & SAUL,
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*Attorneys for Lehigh Valley Railroad Company.*

STRADLEY, RONON, STEVENS & YOUNG,
By DANIEL MUNGALL, JR.,
*Attorneys for Boston & Maine Railroad, Canadian Pacific Railway Company, Delaware & Hudson Railroad, Maine Central Railroad Company and New York, New Haven & Hartford Railroad Company.*

WHITE, WILLIAMS & SCOTT,
By JOHN LEWIS EVANS,
*Attorneys for New York, Ontario & Western Railway.*

Dated: 5/17/56

Approved:

THOMAS J. CLARY, J.

## COUNTERCLAIM.

Defendants, The Baltimore & Ohio Railroad Company, Boston & Maine Railroad, The Central Railroad Company of New Jersey, Central Railroad Company of Pennsylvania, Delaware & Hudson Railroad Corporation, Eastern Railroad Presidents Conference, Erie Railroad Company, Lehigh & New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, The New York Central Railroad Company, New York, New Haven & Hartford Railroad Company, New York, Ontario & Western Railway, Norfolk & Western Railway Company, The Pennsylvania Railroad Company, The Reading Company, and Western Maryland Railway, for their counterclaim allege as follows:

1. Counterclaimants, other than counterclaimant, Eastern Railroad Presidents Conference, are railroads which operate in what is generally known as eastern territory, namely, that generally east of the Mississippi and north of the Potomac Rivers and are engaged in the transportation of passengers and the hauling of freight in interstate commerce.

2. Counterclaimant, Eastern Railroad Presidents Conference, is an unincorporated association having its principal and only office at 143 Liberty Street, New York, New York. Its membership consists in the main of the presidents or trustees of the other counterclaimants described in paragraph 1.

3. Plaintiffs, against whom this counterclaim is brought, other than plaintiff, Pennsylvania Motor Truck Association (hereinafter referred to as PMTA), operate trucks in Pennsylvania and in other states within the eastern part of the United States, and are engaged in the long-distance hauling of freight in interstate commerce in competition with counterclaimants.

4. Plaintiff PMTA is a Pennsylvania corporation, whose membership includes, among others, most of the plaintiffs.

5. This counterclaim arises under the antitrust laws of the United States and more particularly under Sections 1 and 2 of the Act of July 2, 1890 (26 Stat. 209, 15 U. S. C. A. §§ 1 and 2), commonly known as the Sherman Act. Jurisdiction thereof is conferred upon this court by the institution of the action in which this counterclaim is filed and by Sections 4, 12 and 16 of the Act of October 15, 1914, as amended (38 Stat. 731, 736 and 737, 15 U. S. C. A. §§ 15, 22 and 26), commonly known as the Clayton Act.

6. Beginning in or about the year 1945, the exact date being to the counterclaimants unknown, and continuing to and including the date of this counterclaim, plaintiffs have been engaged, and are now engaged in the manner and by the means hereinafter alleged (particularly through the agency of plaintiff PMTA and Allied Associates, Inc., a publicity agent retained by plaintiffs to advise, assist and represent them) in a combination and conspiracy in unreasonable restraint of trade and commerce among the several states in violation of Section 1 of the Sherman Act; and said plaintiffs, in said manner and by said means, have been and are engaged in a combination and conspiracy to monopolize, and have attempted and are attempting to monopolize such trade and commerce in violation of Section 2 of the said Act; all for the purpose and with the intent of

(a) Restraining and limiting the competition of counterclaimants with plaintiffs in long-distance hauling of freight in interstate commerce;

(b) Restraining and limiting counterclaimants' development, growth and expansion as competitors of long-distance-hauling motor carriers in such interstate commerce;

(c) Preventing the establishment of fair competitive conditions between plaintiffs and counterclaimants;

(d) Destroying the favorable relations existing between counterclaimants and their customers;

(e) Destroying the favorable relations existing between counterclaimants and the major segment of the trucking industry;

(f) Creating in the minds of public officials and the general public an unfavorable attitude toward counterclaimants;

(g) Increasing counterclaimants' cost of doing business;

(h) Acquiring and maintaining an unjust competitive advantage for plaintiffs over counterclaimants through concealed indirect subsidies to plaintiffs borne by the general public.

Plaintiffs are continuing and threaten to and will continue said offenses unless the relief hereinafter prayed for in this counterclaim is granted.

7. As a part of the aforesaid combination and conspiracy and to accomplish the purposes and objectives thereof, plaintiffs and other participants in the said combination and conspiracy have combined to utilize and have utilized, among others, the following methods and means:

(a) Circulated and caused to be circulated, false, malicious and defamatory statements concerning counterclaimants to the effect: that they do not pay proper taxes; that they have been dishonest in their dealings with farmers and farm organizations; that they have improperly and unjustly attacked the trucking industry; that they have bribed public officials and officials of independent organizations; that they have misused the mails; that they have published false and misleading reports on the Maryland Road Test; that they improperly

seek to maintain high freight rates to the detriment of the shipping public; and that they have conspired to monopolize and interfere with interstate commerce in the long-distance hauling of freight; et cetera;

(b) Disseminated, and caused to be disseminated, false, malicious and defamatory statements concerning counterclaimants, their credit and financial standing to bankers, brokers, investors and others in the financial world;

(c) Systematically and deliberately violated the weight limitations, traffic and other laws relating to the highways to further their unfair subsidized competitive advantage over the counterclaimants;

(d) Instituted and maintained this action in bad faith, in abuse of the judicial process, to cause counterclaimants great expense, to harass counterclaimants, and to provide an opportunity for the repetition and dissemination of the false, malicious and defamatory statements set forth in paragraph 7(a) hereof and other false, malicious and defamatory statements;

(e) Obstructed, attempted to intimidate, and attempted to prevent counterclaimants from bringing about fair and equitable competitive conditions (1) through the exercise of their constitutional right to petition the legislatures of the several states for legislative action designed to promote fair and equitable competitive conditions, and (2) through the exercise of their constitutional right to expose plaintiffs' distortions and misrepresentations of competitive conditions in the business of long-distance hauling of freight, in the following manner:

i. By stimulating and instigating litigation by third parties against counterclaimants and others who opposed legislation desired by plaintiffs or supported legislation opposed by plaintiffs;

ii. By seeking, through false, malicious and defamatory statements and other improper means, to impose on counterclaimants unreasonable burdens and restrictions which would interfere with the maintenance of efficient, expeditious and economical transportation of freight and passengers in interstate commerce;

iii. By creating, through false, malicious and defamatory statements and other improper means, an atmosphere of hostility toward counterclaimants among government officials, municipalities, shippers, suppliers, banking houses, investors and others; and

iv. By disseminating false, malicious and defamatory statements as set forth in paragraphs 7(a) and (b), together with other false, malicious and defamatory statements, and by instituting and maintaining the action set forth in paragraph 7(d) hereof.

8. The aforesaid combinations and conspiracies, and the attempt to monopolize, have had, as intended by plaintiffs, the effect of unreasonably restraining trade and commerce in the hauling of freight to the detriment of the public interest in that:

(a) The cost of counterclaimants' operations have been increased, and will be further substantially increased, unless the activities of plaintiffs are restrained, with the result that (1) the cost of the transportation of freight to counterclaimants' customers will be increased and (2) the well-being of the entire railroad industry and sound economic conditions in transportation will be seriously impaired to the further detriment of the public dependent upon that industry for safe, adequate, economical and efficient service;

(b) The general public has been required to continue to pay an indirect subsidy to plaintiffs through taxes imposed for the construction of highways with standards exceeding those necessary for ordinary highway traffic and for the repair and maintenance of the extraordinary damage to present highways caused to a substantial extent by heavy trucks.

9. The combinations and conspiracies, the attempt to monopolize, and the acts performed pursuant thereto have been the proximate cause of great and continuing damage to the counterclaimants:

(a) By preventing the establishment of fair competitive conditions and thereby causing wide diversion of substantial traffic from the counterclaimants;

(b) By disparaging and damaging the counterclaimants in their business relationships with the public thereby adversely affecting those relationships, by impeding them in the legitimate conduct of their business, by increasing their expenses of operation, by damaging their credit and causing high interest rates on securities issued by them, and by causing them to lose accounts, profits, and prospective profits;

(c) By impeding counterclaimants' development, growth and expansion as competitors of long-distance-hauling motor carriers;

(d) By forcing the counterclaimants to incur substantial costs and to expend great efforts to defend themselves against plaintiffs' activities.

The damages to each respective counterclaimant cannot at present be measured with exactness and precision because of the nature of the injuries done to them, for which the plaintiffs are solely responsible. The damages to the counterclaimants in the aggregate are, when trebled under the antitrust laws, in excess of $120,000,000.

10. Each counterclaimant is suffering and will continue to suffer irreparable harm and injury unless the plaintiffs are enjoined from their conspiracy, from the acts complained of herein or from any other acts in pursuance of their conspiracy.

WHEREFORE, counterclaimants demand:

(a) That each and everyone of the plaintiffs, their subsidiaries, affiliates and successors, and their officers, employees and agents; or any persons acting for or in concert with them be enjoined and restrained from continuing the practices complained of herein or from taking any action in furtherance of or calculated to perpetuate their illegal conspiracy;

(b) That each and everyone of the plaintiffs be required to pay to each of the counterclaimants threefold the damages determined to have been suffered by such counterclaimant together with costs and reasonable attorneys' fees.

BARNES, DECHERT, PRICE, MYERS & RHOADS

By: PHILIP PRICE,

*Attorneys for The Pennsylvania Railroad Company.*

DRINKER, BIDDLE & REATH

By: FRANCIS HOPKINSON,

*Attorneys for The Central Railroad Company of New Jersey, Central Railroad Company of Pennsylvania, Norfolk & Western Railway Company, Western Maryland Railway.*

GUCKLES, SHRADER & BURTT

By: JOHN A. SHRADER,

*Attorneys for The Baltimore & Ohio Railroad Company.*

MONTGOMERY, MCCRACKEN, WALKER & RHOADS

By: JOSEPH W. SWAIN, JR.,

*Attorneys for Eastern Railroad Presidents Conference.*

MORGAN, LEWIS & BOCKIUS

By: ARTHUR LITTLETON,

*Attorneys for Erie Railroad Company, and The Reading Company.*

MYERS & O'BRIEN

By: FRANCIS J. MYERS,

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SAUL, EWING, REMICK & SAUL

By: HARRY E. SPROGELL,

*Attorneys for Lehigh Valley Railroad Company.*

STRADLEY, RONON, STEVENS & YOUNG

By: DANIEL MUNGALL, JR.,

*Attorneys for Boston & Maine Railroad, Delaware & Hudson Railroad Corporation, Maine Central Railroad Company, and New York, New Haven & Hartford Railroad Company.*

JOHN LEWIS EVANS

Per C. L. CUSHMORE, JR.,

*Attorneys for New York, Ontario & Western Railway.*

HAROLD B. BORNEMAN,

*Attorney for Lehigh & New England Railroad Company.*

## PLAINTIFFS' REPLY TO DEPENDENTS' COUNTERCLAIM.

### First Defense.

1. Plaintiffs admit the allegations of paragraphs 1, 2, 3 and 4 of the Counterclaim, except that plaintiffs deny that the only office of the Eastern Railroad Presidents Conference is at 143 Liberty Street, New York City, New York.

2. Plaintiffs deny each and every allegation of paragraphs 5, 6, 7, 8, 9 and 10 of the Counterclaim.

### Second Defense.

3. Defendants' Counterclaim, insofar as it asserts claims prior to June 25, 1952, is barred by the Statute of Limitations, 15 U. S. C. A. Sec. 15b.

### Third Defense.

4. Defendants' Counterclaim is barred by Laches.

### Fourth Defense.

5. Defendants' Counterclaim fails to state a claim on which relief can be granted.

WHEREFORE, plaintiffs request dismissal of defendants' counterclaim, together with costs.

DILWORTH, PAXSON, KALISH & GREEN

by /s/ AARON M. FINE,
*Attorneys for Plaintiffs,*
2635 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pa.

July 3, 1956.

## EXCERPTS FROM TESTIMONY.

(530) C. COLBURN HARDY, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

* * *

By Mr. Kohn:

Q. Well, Mr. Hardy, am I correct that your function as an employee of Byoir in connection with this account was that you were responsible for the overall supervision of the account, policy decisions, client relationships, (531) employment of staff personnel, and, in cooperation with Hutchinson, the creation and execution of programs?

A. No, sir.

Q. Would you look at Exhibit P-4B.

Mr. Kohn: Do we have another copy of this?

Mr. Kalodner: No.

By Mr. Kohn:

Q. That is an exhibit which was introduced in evidence during the testimony of Mr. Swinehart, your company then president, now Chairman of the Board.

A. That is right.

Q. "General responsibilities of staff members, Eastern Railroads Transportation Committee. Hardy: Reports to Swinehart and Hammond.

"Responsible for: Overall supervision of account, policy decisions, client relationships, employment of staff personnel, and, in cooperation with Hutchinson, creation and execution of programs."

Is that what it says?

A. Yes. It does.

Q. Is that wrong?

A. It is wrong in the context which was asked me, sir. This memo dates from approximately June, 1952. Prior to that time I was directly responsible to Mr. Girdler on (532) this account.

Q. Well, then at least from June, 1952 it is correct?

A. Yes, sir.

Q. And prior to that you reported directly to Mr. Girdler?

A. Yes, sir.

• • •

(1227) C. COLBURN HARDY, resumed.

By Mr. Kohn:

• • •

(1274) Q. In a sense, it was sort of your finest hour?

A. Well, I wouldn't say so. It might have been at the time.

The Court: Are we having a lawsuit or are we having a little psychological discussion here.

Mr. Kohn: That, sir, apparently is this man's business.

The Court: All right, go ahead.

• • •

(1336) PATRICIA LOCHRIDGE HARTWELL, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Kohn:

Q. Mrs. Hartwell, your professional name while you were with Byoir was Patricia Lochridge?

A. That is correct.

Q. And you came to Byoir in 1949?

A. Yes.

Q. You became head of the Magazine Department early in 1950?

A. Right.

Q. The Magazine Department was one of the separate component departments of the Byoir organization?

A. Yes.

• • •

(1337) Q. Turning back for a moment to Exhibit P-34, the information stated in that report P-34 with regard to the work of your department is correct, is it not?

A. No, it is not correct.

Q. It is not?

A. No.

Q. What is incorrect about it?

A. Well, to the best of my knowledge—and I believe I really do know all the circumstances—this article had been prepared quite independently of Carl Byoir & Associates and the Magazine Department. It was an independent assignment given by the magazine to Mr. Brownell, and it was not (1338) until the article had actually been scheduled and in fact published that we ever saw it or had anything to do with it.

Afterwards I did see Mr. Brownell, who was an old colleague of mine from our days on the magazine, and we talked about the article after publication, but we had nothing to do with this article prior to publication.

• • •

DIRECT EXAMINATION.

By Mr. Price:

• • •

(1381) Q. Did you have things in your Research Department that were similar to those in the New York Public Library and other public libraries?

A. Oh, yes. I think they were perhaps more conveniently arranged, and we had almost, I would say, a duplicate of anything that you would find in either the New York Public Library or perhaps the New York Times Morgue.

Q. Were they original source materials or were they digests of such materials?

A. Oh, no, they were the original source material.

Q. Such as——

A. Well——

Q. Not a complete list, but just give me two or three examples.

A. Well, it would range from anything from a collection of speeches that had been given at a scientific meeting of engineers to, well, the files of the Brookings Institution, to the collection of articles that might have been printed in various old municipal publications dealing with road problems.

We went to the "Readers Guide" and tried to get all the expert authority that we could get and then ordered reprints or photostats of this type of material. (1382) They were reports, as I say, by the Bureau of Public Roads. They were reports by the tire companies, by the oil companies, by the truck manufacturing companies, by the ICC. I mean almost anything.

Q. Well, after you got this railroad account, was the kind of material you had representative of the railroads' point of view alone or was it general? Did it have the truckers' point of view as well as the railroads' point of view?

Mr. Kohn: She is an intelligent woman, Mr. Price. You don't have to lead her.

Mr. Price. I think she is, too. That is why I asked her the question, so she can tell us the kind of material she had.

A. Yes, I believe we had everything that had been published on either side of the subject.

By Mr. Price:

Q. What is the "Readers Guide"?

A. The "Readers Guide to Periodical Literature" is a volume which is put out monthly and then again put out

annually, which lists, under certain classifications, everything that has been written on a given subject. It is useful in helping you not to miss anything that is coming out, and it is also useful for you to see. You (1383) can check the guide, and if you see that magazine X hasn't published something on the subject of roads for five years, you think, well, perhaps the editor might then be interested because he hadn't covered the subject.

Q. Did you have any articles or material from technical experts writing on this subject as well?

A. Oh, yes. As I say, from the highway officials of the various states, from the society in Washington, whose headquarters were in Washington, from, as I say, oil companies, from every source.

Q. Now, were these data that you had available to anybody except your own staff?

A. I beg your pardon?

Q. Did you make this material available to anybody outside the Byoir organization?

A. Oh, yes, it was available to anyone who was interested in the subject.

• • •

(1901) RAYMOND J. LITTLEFIELD, having been duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. Kohn:

Q. Mr. Littlefield, you were chairman of the Research Committee of the Competitive Transportation Committee of the ERPC for several years?

A. Yes, sir.

Q. And you were also associated with the Pennsylvania Railroad?

A. Yes, sir.

Q. And you are at the present time manager of property taxes of the Pennsylvania Railroad?

A. That's correct.

Q. And you were previously the general tax agent for the Pennsylvania Railroad?

• • •

(1977) Q. 10: "General Motors is thoroughly interested in cooperating with railroad industry on taking long-haul trucks off highways and putting them on flat cars, or some (1978) other method."

And you so reported to Mr. Patchell?

A. Yes, sir.

• • •

DIRECT EXAMINATION.

(2078) By Mr. Price:

Q. Paragraph No. 10.

A. Yes, sir.

Q. That relates to General Motors being interested in cooperating with taking long-haul trucks off highways and putting them on flat cars, or some other method. What kind of other method did you have in mind there?

A. At that time there was talk of developing a unit that could run both on rails and highways. There was talk of developing the container idea. In other words, instead of transporting the whole truck chassis on a flat car, simply lift the body off the wheels and put it on a flat (2079) car.

Q. Was the method, whatever the method might be, connected with carriage on railroad cars of some kind?

A. Yes, sir.

Q. What is the present form of carriage of that character, and what is it called?

A. Piggy-back has developed very rapidly in the last two years. There is also the container idea. It has not developed nearly as fast, but it is developing. But the piggy-bank, which means taking the trailer on the flat car and hauling it from station to station by rail, has developed very fast in the last two years, and at least 15 railroads are now engaged in so-called piggy-back service.

• • •

(2103) Q. Now, with reference to your comments on the speech, will you turn to paragraph 4 and read that.

A. "By giving the shipper the benefit of the coordinated service—long-haul by rail and short-haul by truck—it makes the service competitive with the over-the-road truck service. Otherwise, there would be many more long-haul trucks on public highways today."

(2104) Q. Now, with reference to that comment "it makes the service competitive with the over-the-road truck service," is over-the-road truck service what is known as long-haul truck service?

A. Yes, sir.

Q. Then if you had this coordinated service that you are talking about, would there still be long-haul truck service to be competitive with?

A. Oh, yes, sir, there would be some, but by improving the service to the shipper in this manner, coordinating long-haul by rail and short-haul by truck, we were able to save in many cases 48 hours.

Q. By "we" whom do you mean?

A. The Pennsylvania Railroad.

Q. All right.

A. Was able to speed up the service by 24, and in many cases 48 hours, and thereby give just as good service as the long-haul truck. And we knew that if we didn't do that and used the truck to supplement rail service, the long-haul truck was going to continue to take much more business away from the railroad.

Q. Paragraph 5.

A. "Long-haul by rail plus short-haul by truck (2105) effects economies to the railroads. Otherwise, the railroads would have to charge rates on merchandise traffic that would drive much more of the business to the over-the-road trucks. This has been demonstrated time and time again at our hearings before the I. C. C.

for the right to operate truck routes in lieu of local freight trains in short-haul service."

Q. Does that refer to the same competitive situation you speak about?

A. Yes, sir.

Q. Will you turn to the next page, the second full paragraph.

A. "One of the reasons why one large railroad went out of the long-haul, over-the-road trucking business—it would not resort to illegal use of public highways to compete with other long-haul trucks."

Q. What does that refer to?

A. That refers to the activities of the Pennsylvania Railroad. The Pennsylvania was the first railroad to apply to the Interstate Commerce Commission for the right to operate long-haul trucks on public highways. It operated long-haul trucks strictly as truck lines and no relation to the railroad for a matter of two or three (2106) years, and it went out of business because—it discontinued those lines because it would not resort to the illegal practices that were prevalent on public highways at that time.

Q. What illegal practices do you refer to?

A. Overloading, ignoring the safety provisions of the Motor Carrier Act, working men longer hours than were permitted by the Motor Carrier Act, and other violations of the Motor Carrier Act that was passed just prior to this period, passed in 1935.

* * *

(2150) PATRICIA LOCHRIDGE HARTWELL, recalled.

DIRECT EXAMINATION.

By Mr. Price:

* * *

(2156) Q. Now, can you tell me what connection Byoir had with that article and its preparation?

A. We had written an outline of an article "Revolution On The Roads" which we presented to one of the junior editors of "Harper's" with the suggestion that if the magazine liked the idea and wanted such an article we would be happy to work with them or work with a writer of their choosing.

At that time I spoke to a Mr. Eric Larabee on their staff. Mr. Larabee was interested in the material but it happened that they already had an article in the works and had assigned Mr. Myron Stearns to this article.

I had known Mr. Stearns for a number of years. I got in touch with Mr. Stearns, talked to him about the assignment. He returned to our office and worked one or two days with our files and then returned to his home in Connecticut, where he drafted the article and turned it in to the editors of "Harper's" Magazine.

Q. This staff-written article which you refer to on page 3 of P-34, was that the one that you had submitted as (2157) a suggestion to "Harper's"?

A. That's correct, yes.

Q. Was that a final draft of an article or was it an outline or was it less formal than the completed article was intended to be?

A. Oh, it was a long outline. I would say it probably ran fifteen hundred, two thousand words, a fairly detailed presentation of the story but not a completed manuscript.

Q. Did Mr. Stearns use that in any way, so far as you could tell?

A. No. Mr. Stearns I don't think ever saw that.

Q. Then the files that you describe as having been made available to Mr. Stearns were the Byoir files?

A. That is correct, yes.

Q. In your office in New York?

A. Yes.

Q. Did you give him any editorial material, or did you simply turn him loose in the research files?

A. No, we turned him loose. The only material that I did give him was a memo of an interview that I had conducted with Commissioner MacDonald and Mr. Fairbanks, of some weeks previously, in Washington. I gave him my notes on that.

• • •

EXCERPT FROM HEARING OF NOVEMBER 16, 1956 BEFORE HON. THOMAS J. CLARY, J. (IN CHAMBERS).

(2766) The Court: I don't think that we are going to have too much trouble in either court, because, fundamentally, as nearly as I can see, the facts as such are not controverted.

Mr. Price: Essentially, I think that it is true.

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(2879) HAROLD A. THOMSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

Q. Mr. Thomson, did you give us your full name?

A. Yes, sir, I did.

Q. Are you also known as Cappy Thomson in certain circles?

A. That is a nickname.

Q. Will you give us your background and experience going back to your educational experience in college.

A. Basically civil engineering. High school, prep school, University of Pennsylvania. Registered professional engineer in Pennsylvania since 1923.

Q. When did you graduate from college?

A. 1913, C. E.

Q. Was that where you got your engineering degree?

A. Right.

Q. Or did that come later?

A. That came later. The registration of 1923 is the qualification.

Q. After college what was your business or professional experience?

A. Engineering. Pennsylvania State Highway Department (2880) until 1923.

Q. When did you go with the Highway Department?

A. 1913.

Q. So you were there ten years?

A. Yes.

Q. And thereafter?

A. Private engineering from 1923 on. Became Secretary Pennsylvania State Association of Township Supervisors, 1926. Held that office to date. In the insurance business since 1935 to date.

* * *

(2891) Q. What has the position of the township supervisors been with reference to weights of motor vehicles? Has it had any official position?

A. Well, as long as I can remember, the general attitude has been one of opposition to any increase in the legal weights permitted over our roads and bridges, and for a long time, advocated a decrease.

Q. When was the first formal action taken by the supervisors of which you were aware?

A. Formal action?

(2892) Q. Yes.

A. The first formal action, I believe, was in 1933.

Q. And what form did that take?

A. That took the form of a state convention resolution adopted at the state convention unanimously at that time.

Q. Have you a copy of that resolution with you?

A. I have.

Q. Would you read it, please?

A. Resolution No. 8, February 14-15, 1933, at Harrisburg, Pa.

"Resolution #8: Whereas all of the highways of our State, except a few of the heaviest and most expensive construction, are being seriously injured by heavy truck traffic; therefore be it resolved that we urge legislation reducing the present excessive gross weight now allowed by law to a more reasonable and less destructive limit."

Quote, Chairman Ferringer—Mr. Ferringer was Chairman of the Resolutions Committee—"You will notice we do not suggest any weight. That is for the engineers to figure out. We simply ask a reduction. (Upon Chairman Ferringer's motion to adopt, this final resolution passed unanimously.)"

Q. What was the next formal action that the supervisors (2893) took in respect of motor vehicle weights?

A. I will have to refer to the——

Q. Was it 1948?

A. I believe it was.

Q. I suggest you look at page 7 there, May, 1948.

A. It is continued on 15, I believe.

Yes. 1948.

Q. On what occasion was this resolution adopted?

A. This is another resolution of the state convention of Township Supervisors.

Q. Adopted when?

A. February 13, 1948.

Q. And will you read the resolution?

A. (Reading):

"Whereas the legislature seems to be inclined to listen favorably to the demands of the trucking interests and have repeatedly granted them permission to carry heavier and still heavier loads; and whereas the

present permissible load is greater than 90 per cent of our improved roads and bridges can carry and is seriously damaging many rigid and semirigid types of roads and bridges; and whereas enormous sums of money must be spent to repair this truck-caused damage and to build the roads and bridges strong enough (2894) to stand up under such punishment; therefore, be it resolved that our association is opposed to any further increase in the permissible weight of truck loads."

Q. You spoke about this being the state meeting or annual convention. Will you just tell us what that meeting is? Is it an annual meeting or is it held more often than annually?

A. No. It is an annual convention.

(2895) Q. And who attends the Annual Convention?

A. Delegates elected annually from every County Association in the state.

Q. Then approximately how many of such delegates are there?

A. About 200.

Q. And each county has a separate association?

A. That's right.

Q. What does the County Association consist of?

A. The County Association consists of all of the township officials in that respective county, the township supervisors, secretaries, auditors, assessors, tax collectors, solicitors, and engineers.

Q. They elect delegates to the State Association?

A. Correct.

Q. Is that based on a per capita formula or how is the number of delegates from each county determined?

A. The number of delegates from each county is based upon the number of townships in that county, with one delegate being elected for each ten townships or fraction thereof.

Q. After 1948 what was the next formal action that was taken in this regard?

A. I beg your pardon; I didn't get that question.

Q. The next formal action, and I refer you to 1949, April, (2896) 1949. Page 25 may be the place where it is reported in your book.

A. This is a transcription of the proceedings of the State Convention of February 11, 1949:

"Resolution No. 7. Resolved that we oppose any increase in the legal gross weight of trucks permitted on the roads and bridges in Pennsylvania.

"Thereupon, upon motion duly made and seconded, said motion was carried unanimously."

Q. In 1950 was there any formal action taken? Look at the April, 1950, issue, Page 41.

A. This is a transcription of the State Convention of February 7, 1950, Philadelphia.

"Resolution 6. Whereas the huge freight trucks traveling the highways of Pennsylvania continue to cause excessive damage to our roads and streets, therefore be it resolved that we continue our opposition to any increase in existing weight limits of trucks and demand a decrease in the present excess weights when and where such trucks are to be used on township roads; and be it further resolved that we request from both state and local authorities a more strict enforcement of existing weight limits.

(2897) "Motion for adoption duly made, seconded, and carried."

Q. Was there any such action taken in 1951? Refer to the May, 1951, issue, Page 29.

A. This is the proceedings of the State Convention of February 12-13, 1951, Pittsburgh, Pennsylvania:

"Resolution No. 2. Whereas the huge freight trucks traveling the highways of Pennsylvania con-

tinue to cause excessive damage to our roads and streets, therefore be it resolved that we continue our opposition to any increase in existing weight limits of trucks and demand a decrease in the present excessive weights when and where such trucks are to be used on township roads; and be it further resolved that we must request from both state and local authorities a more strict enforcement of existing weight limits.

"Unanimously adopted without remarks."

Q. In 1952 was there any such action taken, March, 1952, Page 52.

A. This is the proceedings of the Convention of February 4 and 5, 1952, Philadelphia, Pa.:

"Resolution 8. That we continue our opposition to any increase in truck weights in Pennsylvania and (2898) express our thanks and appreciation to Governor Fine for his courageous act in vetoing Senate Bill 615 of the 1951 Session.

"I move the resolution be adopted.

"Motion seconded and carried."

Do you wish the rest of the proceeding on that?

Q. That is the end of that resolution?

A. That is the end of the resolution. There were comments on it.

Q. Then in 1953 was there any formal action taken, March, 1953, Page 54.

A. This is from the 1953 Convention:

"No. 3, Mr. Doyle. Whereas the condition of our roads and bridges showing constantly increasing strain and poor condition because of the increasing number and weights of big trucks traveling these roads and bridges; and whereas we do not feel that these freight trucks are presently paying their fair share of the road construction and maintenance on either state or local level in Pennsylvania; therefore be it resolved that we

call for strict enforcement of existing weight limits on these trucks and no increase in the legal weight of these trucks; and be it further resolved that legislation should be passed to provide (2899) these trucks shall pay a fair share of their cost of road expense in Pennsylvania by having the 1953 Legislature enact a weight-distance tax on these large trucks similar to existing law in New York State, with the proceeds from this tax being divided proportionately between the State Highway Department and the local governments of Pennsylvania.

"I move this resolution be adopted, Mr. Chairman.

"Thereupon above resolution was seconded by Glen Jacobs, Adams County.

"There being no questions, all those in favor signify aye; contrary no.

"So ordered."

* * *

(2941) HAROLD R. PROWELL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

Q. Mr. Prowell, what is your occupation, sir?

A. I am a lawyer.

Q. And have been since when?

A. 1932.

Q. Where do you practice?

A. Dauphin County, Pennsylvania.

Q. What if any contact have you with the Pennsylvania Motor Federation?

A. General counsel for the past eighteen years.

(2942) Q. Have you any other association with it or any other position with it than counsel?

A. Yes, sir. I am vice-chairman of the Legislative Committee.

Q. And have been for how long?

A. I would say for five or six years.

Q. Have you any other committee connections or assignments?

A. I am vice-president of the Motor Club of Harrisburg, but in the state organization I have no official title other than general counsel and then as vice-chairman of the Legislative Committee. I am frequently appointed to assist other committees, but they are not standing appointments.

* * *

(2943) A. The Pennsylvania Motor Federation is the state organization of AAA Motor Clubs in the Commonwealth.

Q. How is it connected with the AAA organization?

A. The AAA, the American Automobile Association, is the national association. The Pennsylvania Motor Federation is the Pennsylvania State Organization comprising 57 Motor Clubs in the Commonwealth of Pennsylvania.

Q. Is it a corporation or a voluntary association or what?

A. It is a non-profit corporation.

Q. And the members are local clubs.

Q. The members are the local clubs and the members of the local clubs.

Q. How long have you been active here with the Pennsylvania Motor Federation in legislative matters?

A. Ten years.

Q. Are you familiar with the position that the Pennsylvania Motor Federation has taken in respect of motor vehicle weights, particularly truck weights?

A. I am.

Q. Will you give us the history of the Pennsylvania Motor Federation's position in that regard since you have been familiar with it?

A. In 1941 at the annual meeting there was a comprehensive (2944) resolution adopted.

Q. Will you read that resolution? Do you have a copy over there?

A. I have.

"Whereas there has been presented to the Senate Committee on Highways House Bill 690, now known and designated as Senate Bill 472, a bill which, if enacted into law, will permit trucks moving over our highways to increase their maximum load limits from 39,000 pounds to 50,000 pounds, an increase of five and a half tons; and whereas it is deemed advisable to go on record as opposing such an increase in size of said motor vehicles, the Pennsylvania Motor Federation and its 61 affiliated AAA Clubs in Pennsylvania oppose the passage of Senate Bill 472 for the following reasons:

"1. That the increase in weight would aggravate the existing traffic problems and hazards incident thereto.

"2. That the present highways, bridges, and culverts, both on the open highway and in the city and borough limits, were not designed to carry with safety an unreasonable and ever increasing weight limit of trucks.

(2945) "3. That the necessary increase in the length and/or width of said trucks would create an additional hazard to the traveling public seeking to pass on now already crowded highways.

"4. That the increase in length and/or width of the trucks would necessarily tend to slow up the normal movement of traffic, particularly in the mountainous regions of this great Commonwealth.

"5. That until such time as the trucking interests construct and maintain their own highways, the tend-

ency should be toward a reduction from the present limits, rather than an increase.

"6. That with the cost of construction and maintenance of our highways reaching a prohibitive stage, and with municipal thoroughfares and bridges rapidly breaking down under existing weights, the taxpayers of this great Commonwealth, in cooperation with all municipal and country governing bodies, should unite and take steps which will result in a drastic reduction in the present size and weight of trucks moving over our highways.

"Therefore be it resolved that the Pennsylvania Motor Federation and its affiliated AAA Clubs in (2946) Pennsylvania, numbering 61, go on record as unalterably opposed to the passage of Senate Bill 472 or any compromise bill which would permit any increase in load limits; and we hereby direct the secretary of this Association to notify all members of the Senate Committee on Highways, as well as all other members of the Senate, as to the contents and reasons of this resolution; and further that this resolution be spread upon the minutes of this meeting."

Q. Was the policy outlined in that resolution ever modified later on or changed?

A. Very slightly.

Q. In what respect?

A. Except during the war period, when, as a national war emergency, the President asked that weight limits be increased, and we went along with that as a war measure. There was no change until about 1952, when there was a slight modification. However, in 1948, at our annual meeting, we passed another resolution which in effect——

Q. Will you read that resolution.

A. Yes.

"Whereas it is recognized that the use of public highways by trucks and buses in common with (2947)

private passenger vehicles has raised serious problems in the fields of engineering, policing, construction and maintenance of highways, and especially in the field of safety; and whereas these problems are not being solved adequately and satisfactorily by such means as we have been employing to date; and whereas the trucking and bus industries have within their own ranks the ability, capacity, and opportunity to solve many of these problems; now therefore be it

"RESOLVED that we urge the trucking and bus industries to make greater and more adequate efforts to solve these problems, particularly those problems arising out of truck and bus sizes, weights, speeds, and performance, to the end that the private passenger vehicles may more safely, conveniently, and comfortably utilize the public highways, and that the trucks and buses may utilize highways with a minimum damage to the highways, minimum threat to the safety of other vehicles lawfully using said highways, and minimum annoyance to private passenger vehicles."

Q. When was that adopted?

A. That was adopted at the Annual Meeting in 1948.

Q. Were there any other resolutions adopted subsequently (2948) on this general subject?

A. In 1950 at our Annual Meeting there was a resolution adopted:

"Whereas there appears to be no authoritative and impartial investigation or research on the question of damage caused to highways by heavy trucks, it is recommended that the American Automobile Association immediately cause such research and investigation to be made, to the end that an intelligent and just policy may be adopted by this Federation."

Q. Was such procedure followed as was recommended by that resolution?

A. I cannot answer that question except by saying that in December of the same year the Executive Committee decided to appoint a committee of the Pennsylvania Motor Federation to do just about the same thing.

Q. Whose Executive Committee?

A. That is the Pennsylvania Motor Federation Executive Committee. I have a transcript of our minutes of that meeting. Would you like me to——

Q. Before you get to those, did the National Association do anything in respect to your request?

A. As I said, I can't answer that.

Q. Did you know of any?

(2949) A. No, sir.

Q. All right, then, your Executive Committee took what action in December of 1950?

A. I will read a transcript of the minutes.

"It was the opinion of several members of the Committee that the PMF"—that is the Pennsylvania Motor Federation—"should take a definite stand as to whether they did or did not approve increasing the present truck weights. It was also pointed out that since we represent the motoring public it would not be to our advantage to recommend an increase in truck weights at this time, since the public definitely is opposed to this action. Some members of the Committee also felt that our present system is not able to support increased weights.

"On motion of Kreisle and Firman it was recommended that a committee be appointed to study the subject of truck weights from every angle, and it was also recommended that the Committee, if necessary, procure engineering assistance on the problem, and until such time as the study was concluded, the Federation be opposed to any change in truck weights at this time."

Q. What if anything was done pursuant to that resolution?

(2950) A. I think that at that time the Maryland tests were being planned or may have been underway. In any event, it was the duty of this Committee to follow the Maryland tests to determine, first of all, whether they would be authoritative tests, whether they were fair tests, and whether we could accept the results at their face value, and, of course, after they were completed, to evaluate the conclusions.

Q. Was there any other formal action taken by the Association or by the Executive Committee?

A. In July of 1951 the Executive Committee minutes contained the following reference:

> "Senate Bill 615. The Big Truck Bill, as you know, passed the Senate by a majority of 31 to 18. It is presently in the House Committee on Motor Vehicles. We have asked all of our clubs to poll the members of the Legislature to see just how they stand. I am told that the House of Representatives is about equally divided, with a fair chance of the bill passing as the situation now stands. The Executive Committee, as you will remember, went on record a year ago opposing any further increase in gross weights until the Maryland tests have been completed and full technical knowledge was available (2951) as to just how much our roads would stand."

Q. What did the Pennsylvania Motor Federation do in respect to asking action from the various local associations in the line of this resolution?

A. I believe the State Association sends out a legislative bulletin, which is a news weekly, telling what goes on in the Legislature. In that bulletin they would ask from time to time the clubs to take some action, contact their legislators on certain bills, and I believe that was done with reference to the truck bill at or about this time.

Q. Was there any other resolution that the Association adopted on this subject?

A. Chronologically, sir, the next development was the Governor's hearing, and then in 1953, June, at our Annual Meeting the Legislative Committee made a report recommending, and then the Annual Meeting approved, the position of discouraging any additional increase in truck weights that do not have the approval of the Highway Department, to make certain that our highway system will stand additional loads, and until we have convincing proof that additional weights will not react disastrously on our present system.

* * * * *

(2969) JOAB K. MAHOOD, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

Q. Mr. Mahood, what is your occupation?

A. Well, at the present time, I am Chairman of the Pennsylvania Milk Control Commission.

Q. Would you give us your general background and experience?

A. I was born on a dairy farm in Bradford County. My formal education ceased at graduation from high school. I entered the dairy business at that time, or very soon afterwards, and I still have some dairy farms in Bradford County.

I have operated a small insurance agency since the early 1920's. I was closely connected with the Grange since 1910. This insurance agency, which I operate, is also connected with the Grange. I was a Deputy in the Grange for many years, and in 1943 I was elected Secretary of the Pennsylvania State Grange and Managing Editor of the Grange News, and legislative representative of the State Grange at the same time, which positions I held until I was ap-

pointed to the Milk Control Commission (2970) on March 2, 1952.

• • •

(2973) Q. Now, the main purpose of the Grange organization is what?

A. To promote the welfare of agriculture, in particular.

Q. And what if any interest have they shown in roads?

A. Well, probably no subject has been discussed more often in Grange circles than roads. I have been a member of the organization since 1910, and I recall no subject that has been of greater importance to the Grange than roads, and particularly rural roads and what we call farm-to-market roads, the secondary system in Pennsylvania.

Q. Farm-to-market roads are in general what?

A. Well, they are the feeder roads which come into the (2974) main arteries of travel, the roads by which the farmer takes his produce to market, and over which most of his travel occurs.

Q. There has been some talk in this case about Pinchot Roads. Can you describe those in terms of the type of roads we are speaking of?

A. Well, Pinchot Roads are, as we term them, a part of that rural system. They are a part of a great campaign, or resulted from a great campaign to get the farmer out of the mud, back in the twenties, in which the Grange had a prominent part, and they have been a great benefit to the farm people of Pennsylvania. It has always been the ambition of the Grange to have more roads of that type, and a great deal of our effort has been spent in securing roads of that type to aid the farmers.

Q. And do they take any action with respect to the bridges on such roads?

A. Not in particular, except that we were quite concerned that the 'ouldn't be destroyed by heavy loads.

Q. And did you take any active part in respect to taxes that were levied to pay for such roads?

A. Yes.

Q. How long has the Grange been active in that field?
(2975) A. Well, much longer than I have any recollection.

Q. When were you first aware of any action taken by the Grange in respect of the motor vehicle weights?

A. Well, I couldn't say exactly when. As I have visited various granges throughout the state, that was always, or for many years, a subject of a great deal of comment. The first formal declaration that I recall on the state level was in either '49 or '50.

Q. Was that the first time that you recall? You say it was '49 or '50?

A. That is the first time that I recall a formal resolution being adopted by the State Grange. There had been a great deal of comment about it over a period of years previous to that.

Q. What action was taken in, say, '49 or '49-'50, and by whom?

A. The delegates of the State Grange voted to oppose any bill increasing the maximum weights of trucks.

Q. Now, how often does the State Grange meet?

A. Once a year.

Q. And who are the delegates? I do not mean their personalities, but how are they selected?

A. The Masters of the local Granges and their wives, if
(2976) any, and the Masters of the Pomona Granges at the county level and their wives are delegates to the State Convention.

Q. And that comprises the membership of the State Convention, does it?

A. That is correct.

Q. Are the proceedings of the State Convention reported or recorded in any way?

A. Yes.

Q. Do those proceedings contain the resolutions such as you have described?

A. They do.

Q. If I showed you that, would you be able to tell us what the resolution was that you referred to?

A. Yes.

Q. Can you tell me what if any resolution was adopted in 1949?

A. In 1949, the resolution referred in particular to coal truck load limits. It reads as follows:

"Whereas, Coal Trucks are loading in such a way as to cause injury to individuals and damage to vehicles and other property when coal falls from the trucks,

"Therefore, be it resolved, That Allegheny (2977) County Pomona Grange, No. 42, petition the Pennsylvania State Grange to ask the Commonwealth of Pennsylvania to enforce present load limits and regulations, and to enact further legislation that would eliminate the above-mentioned dangerous condition."

The committee approved the resolution and the delegates also approved it.

Q. What if any resolution was adopted in 1950?

A. In 1950, there were resolutions from three different counties, the County of Mercer, the County of Tioga, and the County of Potter County, which read:

"Whereas, The legislatures of the several States have rightly enacted laws limiting the weight of loads that may legally be transported on our highways, and

"Whereas, Overloading has become a common practice with certain types of for-hire carriers who are more interested in profits than in obeying the law, and

"Whereas, These violations on the part of a minority of carriers are bringing the motor transport industry into disrepute, and

"Whereas, Thomas H. MacDonald, Commissioner (2978) of the United States Public Roads Administration, has said: 'Specifically, we are overloading our

highways in their traffic volume capacity and their structural capacity . . . and the results are so costly both to individuals and to the public that they total a disgraceful and extravagant waste in the Nation's true economy,'

"Therefore, be it resolved, That the Pennsylvania State Grange go on record as being in favor of holding fast to the present weight limit of 45,000 pounds for trucks and trailers and that the law be strictly enforced."

That action was approved by the delegate body.

Q. And then in 1951?

By the way, would you tell me at what time of year those meetings were held in 1949 and 1950 at which these resolutions were adopted?

A. They were held each year in October.

In 1951, the following resolution was adopted:

"Whereas, Pennsylvania has a larger mileage of state highways than all the six New England States combined, together with New York, New Jersey, Delaware (2979) and Maryland; and

"Whereas, this system of highways constitutes one of the chief physical assets of the State, representing an investment of more than two billion dollars, which deserve to be safeguarded, and

"Whereas, there is pending before the State Senate for concurrence in a few minor House amendments a measure, S. 615, commonly known as the Big Truck Bill, which we consider contrary to the public interest.

"Therefore, be it resolved, That we respectfully ask Governor Fine to veto this bill for the following reasons, if or when it reaches his desk:

"1. It would legalize weight limits for trucks and trailers at higher levels than our primary system of roads was built to carry.

"2. There are literally hundreds of bridges on our State highway system that are posted for lower weight limits than those prescribed in the pending bill.

"3. Since it is a well-known fact that heavy trucks do not always operate on our primary (2980) system of highways, approval of this measure would undoubtedly lead to the destruction of a large part of the mileage of the so-called Pinchot Roads of the state, which have been such a boon to the residents of the rural districts.

"4. Due to inflated costs and the prevailing national emergency it is impossible to give as much attention to our roads as they deserve. It is the part of wisdom, therefore, to carefully safeguard the roads we already have."

This resolution was adopted by the delegate body.

Q. What distribution was given to those resolutions after they were adopted? What publicity was given to them?

A. They were given to the press at that particular time. They were then printed in this Journal of Proceedings, which goes to each delegate to the convention.

Q. Was any of those resolutions influenced or prompted in any way by any representative of the railroads or the Byoir organization?

Mr. Kohn: Objected to.

The Court: Overruled.

The Witness: No.

(3033) BEATTY H. DIMIT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

Q. Dr. Dimit, what is your present occupation?

A. At the present time I am connected with the—retired as a college professor and have just left the State Grange as its master. I am now an officer in the National Grange as priest-analyst. That corresponds to secretary.

(3035) Q. Are you familiar with the attitude of the Pennsylvania State Grange toward size and weight limits for motor vehicles, particularly large trucks?

A. I am, having been connected as the lecturer and as the master and as a member of the Legislative Committee over those years.

Q. When did the Grange first take any public position with reference to truck weights?

A. I believe 1949 or 1950. 1951 was the year that I was elected, and that, I believe, was the time that there was a definite resolution.

Q. The year that you were elected what?

A. Elected master.

(3036) Q. That resolution I think was referred to yesterday by Mr. Mahood, but prior to that time was there any discussion or consideration of the subject in the Pennsylvania State Grange?

A. Yes, there had been, but several years preceding that. That was the period while I was lecturer.

Q. And 1950 was the first year when there was any formal resolution adopted, so far as you know?

A. Where they put a definite weight.

Q. What was the position of the Grange with reference to trucks?

Mr. Kohn: That is objected to, sir.

Q. From 1949 on.

Mr. Kohn: That is likewise objected to.

The Court: I will overrule it.

A. The position there was that while we were not opposed to trucks, since a great many of our farmers have trucks, yet we realized that the heavy weight was destroying our roads. We felt that they were destroying the roads, and because of that it would require an extra amount of funds to replace those roads, and we were interested in our country roads as well as the main highways and therefore felt that there should be an extra return of money and a saving of our roads until others could be constructed.

(3037) By Mr. Price:

Q. What is the basis of the Grange's interest in this matter of roads? How did they get involved in it?

A. Well, the Grange has always been interested in the farm-to-market roads and the roads as a whole. They have had that position, and also the distribution of the funds that were appropriated, as to how they should be used and distributed.

Q. Did your experience and duties as lecturer involve the subject at all?

A. It did, because as the educational officers we were concerned with the preservation of our highways and with the taxes that had to support those.

Q. Was that a subject of your discussion, subject of your lectures, for any period of time?

A. Yes.

Q. When did you first begin to lecture on this subject?

A. Well, that would be ten years ago. When I was lecturer I traveled over the State.

Q. On behalf of the Grange or as a teacher?

A. That was in behalf of the Grange.

• • •

(3046) Q. Will you look at D-56, please, Mr. Dimit. Before turning to D-56, you said that you published that photograph in the "Grange News." In what connection was that?

A. Showing the destruction that was being written by overloading.

Q. But was it just the picture or was there any article?

A. We ran the description such as is given in the newspaper.

Q. Do you know who wrote the article that appeared in the "Grange News"? Was that you or somebody else?

A. I wrote the article.

Q. You wrote the article. All right. What was your connection with the "Grange News" during this period that you were Master, your official title?

A. I was editor-in-chief.

Q. All right. Now, turning to D-56, do you recognize that editorial?

(3047) A. As one that I wrote.

Q. You wrote that yourself?

A. Yes, sir.

Q. The note at the bottom shows it was a reprint from the March, 1951, issue of the "Grange News"?

A. That is right.

Q. Did you write that independently of any information obtained from Byoir or from the railroads?

A. Yes, sir.

Q. Will you turn to D-55. That is entitled, "Highway Use Tax," and also shows it was a reprint of an editorial from the June, 1951 "Grange News." Do you know anything about that editorial?

A. Yes, sir. I wrote that.

Q. And did you have any assistance from the railroads or from Byoir or anybody from Byoir in writing that editorial?

A. Not that I recall.

Q. Do you remember the basis of the figures, the source of the figures that you got there?

A. The basis of the figures were taken from the Department of Highways statistics.

(3048) Q. You got them from the Highway Department, Pennsylvania Department of Highways?

A. Pennsylvania Department of Highways.

Mr. Price: Will you mark that D-60.

(Reprint of an article, "Should Pennsylvania Have a Highway Use Tax," reprinted from the May, 1951, "Pennsylvania Grange News," was marked Exhibit D-60 for identification.)

By Mr. Price:

Q. I show you a reprint of an article entitled, "Should Pennsylvania Have a Highway Use Tax," reprinted from the May, 1951, "Pennsylvania Grange News," with your name at the top, and ask you if you know anything about that article.

A. This is also one of my articles.

Q. You wrote that?

A. Yes, sir.

Q. And in the preparation of that article did you get any assistance from Byoir or from the railroads?

A. There might have been some statistics supplied by them, some information, because we were gathering information from all sources.

Q. When was that article prepared?

(3049) A. This would have to be prepared in April because our deadline is April 20.

Q. Of 1951?

A. Of 1951.

Q. And that appeared in the May issue of the "News"?

A. Right.

Q. But that was your article that you wrote, you say?

A. Yes, sir.

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(3105) HERBERT S. FAIRBANK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rhoads:

Q. Mr. Fairbank, you have given the Court your full name.

Did you all hear it?

What is your name?

A. Herbert S. Fairbank.

Q. Where do you live, Mr. Fairbank?

A. I live in Baltimore.

(3106) Q. Where do you live in Baltimore?

A. At 2041 East 32nd Street.

Q. How long have you been a resident of Baltimore?

A. Well, I have been a resident all my life, except as I have been away occasionally.

Q. What is your present employment, Mr. Fairbank?

A. I am retired.

Q. And how long have you been retired?

A. Since 1955.

Q. Prior to that retirement, immediately preceding that, what was your business or profession?

A. I was an engineer, and I was Deputy Commissioner of the Bureau of Public Roads.

Q. The Bureau of Public Roads in Washington: is that correct?

A. Yes, United States Bureau.

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(3256) CROSS-EXAMINATION.

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(3277) By The Court:

Q. What did you say, then?

A. I testified that the——

Q. You said that it could be cut without doing what? I have paraphrased your testimony to bring out a con-

clusion. Now, just exactly what did you testify to when you said that the film was cut? Put it in your language again; then I will draw perhaps another conclusion.

A. I said that the film, shortened as we had agreed that it could be shortened and had authorized the Byron Company to shorten it, would have caused no distortion of the intent and purposes of the full film.

* * *

(3368) CLINTON B. F. BRILL, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rhoads:

Q. Mr. Brill, would you be good enough to keep your voice up so that everyone over here toward the right of my table can hear you?

Where do you live, Mr. Brill?

A. 210 East 73rd Street, New York City.

Q. And what is your business or profession?

A. I am an architect.

Q. And how long have you been an architect?

A. 27 years.

Q. Now, just give me an idea, please, of your educational background, briefly.

A. I was graduated from the Bloomsburg, Pennsylvania, State Teachers College in 1912. I attended Trinity College in Hartford, Connecticut, with the class of 1919, and was graduated with the degree of Bachelor of Science. I subsequently attended the Massachusetts Institute of Technology, taking a special course which included subjects in both architecture and engineering. I received a certificate in 1922.

Q. Now, with what organization or firm are you presently connected?

(3369) A. DeLeuw, Cather & Brill.

Q. And how long have you been connected with that firm?

A. Since its formation in 1951.

Q. And what is your particular association with the firm of DeLeuw, Cather & Brill?

A. I am the managing partner.

Q. And where are their offices?

A. At New York City, 202 East 44th Street.

Q. Now, what if any connection does DeLeuw, Cather & Brill have with DeLeuw, Cather & Company of Chicago?

A. They are affiliated concerns.

Q. Now, in what type of activity does the firm of which you are managing partner operate?

A. We are consulting engineers and architects. Our activities cover a very broad area of general engineering practice with special emphasis on the field of transportation.

Q. And when you say "emphasis on the field of transportation," what do you mean?

A. I mean practically all phases of the field of transportation.

Q. And what if any connection does the operation of your firm have to do with the construction of highways?

A. Well, we have had very substantial experience. I suppose it comprises the vast majority of our activities over (3370) the past five years.

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(3372) Mr. Rhoads: If Your Honor pleases, anticipating the possibility that Your Honor very naturally would be interested in precisely the matter that we would produce by this witness, I have taken the liberty, sir, over the weekend of preparing and submitting to Your Honor, which I will do verbally, a rather complete offer of proof.

I offer, if Your Honor pleases, to prove by this witness the following:

"Mr. Brill is an architect and engineer who is the managing partner of DeLeuw, Cather & Brill of New York City. DeLeuw, Cather & Brill is affiliated with DeLeuw, Cather & Company of Chicago. These organizations are engaged as consulting engineers and architects. Their activities encompass a very broad range (3373) of engineering with special emphasis on the field of transportation. The architectural work is incidental to engineering. The two organizations have a staff of about 275 and about twice that number of employees, the vast majority of whom are technical. Both organizations have had vast experience in the design and construction of highways. They have been engaged in such projects as the Superhighway Plan for Chicago, the Expressway Plan for Milwaukee, Wisconsin, the Northeastern Turnpike, Oklahoma, the Turner Turnpike, Oklahoma, the Dallas-Houston Turnpike, the Inner Loop Freeway System, Washington, D. C., the Expressway System, Providence, Rhode Island, the Lower Manhattan Expressway, the Master Highway Plan, Boston, Massachusetts, the New Jersey Turnpike, the Garden State Parkway, the Southern Freeway, San Francisco, California, the Lake Shore Expressway, Toronto, Canada, the New York State Thruway, the Southern Louisiana Turnpike, the Taconic State Parkway, New York, the Massachusetts Turnpike, the Indiana Toll Road, the Ohio Turnpike and the Sunshine State Parkway, Florida. They have executed preliminary location studies; design and cost-estimates for 20 projects having an estimated construction cost of (3374) $1,800,000,000. They have executed final designs, contract drawings and specifications or have been general consultants for 43 projects having construction costs of $490,350,000. They have supervised the construction of or have been general consultants on 20 projects which cost $338,000,000. Of these projects, Mr. Brill had direct personal respon-

sibility for 23 projects, the construction cost of which was $126,350,000 and for supervision of 13 projects, the construction cost of which was $105,000,000.

"Defendants offer to prove through this witness the following:

"1. Based upon data published by the U. S. Bureau of Public Roads in the year 1949, of the 872,750 miles of roads in the area East of the Mississippi and North of the Potomac Rivers 87% were not designed to carry axle loads of 18,000 pounds and above. In 1954, of the 876,640 miles of roads in the same area 84% were not designed to carry such heavy axle loads.

"2. Subjecting such roads to axle loads of 18,000 pounds or more, for which they were not designed, materially shortens their life expectancy and increases cost of maintenance and reconstruction.

(3375) "3. The Maryland Road Test and the Washo Test substantiate these conclusions.

"4. Based upon data published by the U. S. Bureau of Public Roads the total number of trucks and combinations registered in the area East of the Mississippi and North of the Potomac Rivers has increased from 1,437,000 in 1936 to 3,196,000 in 1954.

"5. Based upon data published by the U. S. Bureau of Public Roads the frequency of occurrence of axle loads of 18,000 pounds or more in 1954 is 250% of the frequency of occurrence of such loads in 1936. The frequency of occurrence of axle loads of 20,000 pounds or more in 1954 is 350% of the frequency of occurrence of such loads in 1936. The frequency of occurrence of axle loads of 22,000 pounds or more in 1954 is more than 400% of the frequency of occurrence of such loads in 1936.

"6. The roads East of the Mississippi and North of the Potomac Rivers are being subjected to increased

frequency of application of heavy axle loads (axle loads of 18,000 pounds or more) which materially shorten the life expectancy of such roads and increases the cost of their maintenance and reconstruction, since the great majority of these roads were not constructed (3376) to withstand heavy axle loads.

"7. Based upon data published by the U. S. Bureau of Public Roads, trucks and combinations in the area East of the Mississippi and North of the Potomac Rivers travelled 2.4 times as far in 1954 as they did in 1936. Single unit trucks travelled 1.8 times as far, and combinations travelled about 4.7 times as far.

"8. This shows a trend in frequency of heavy load applications that will have a serious adverse effect on the major part of the roads in question, at least 85% of which were never designed to carry such loads, thus increasing costs of maintenance and reconstruction.

"9. Not only do heavy trucks have a serious adverse effect on existing highways, thus increasing costs of maintenance and reconstruction, they also affect the current design of highways so as materially to increase the cost of constructing such highways.

"10. Heavy trucks affect the geometric criteria of highway design, such as, pavement widths, structure clearances, gradients, intersections, radius of curves, and number of lanes. All of these factors must be more substantial to accommodate heavy trucks, and therefore there is considerable increased expense in providing such facilities in designing highways for (3377) heavy truck traffic.

"11. Both the pavement and the foundation of roads for heavy trucks must be thicker to sustain heavy axle loads than those required to sustain light loads and passenger vehicles. Therefore, in this regard also it is more expensive to construct highways for heavy trucks than for light vehicles.

"12. Bridges must be heavier and therefore more expensive to sustain heavy trucks than to sustain light vehicles."

We anticipate, sir, showing substantially all of what I have indicated as briefly as I could through this witness and based upon his experience.

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(3398) JACK E. LEISCH, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rhoads:

Q. Mr. Leisch, what is your business?

A. I am a highway engineer.

Q. A graduate of what institution?

A. The Baltimore Polytechnic Institute, the Maryland Institute of Art, and the Johns Hopkins University, in 1934, with a degree of Bachelor in Engineering.

Q. Won't you please keep your voice up? I am afraid I can hardly hear you here, Mr. Leisch.

Now, just give us briefly your educational background, Mr. Leisch.

A. I am a graduate of the Baltimore Polytechnic Institute, the Maryland Institute of Art, and the Johns Hopkins University.

Q. And any degrees?

A. Yes.

Q. What?

A. Bachelor of Engineering in Civil Engineering, 1935.

(3399) Q. 1935?

A. Yes.

Q. Now, are you a member of any professional societies or associations?

A. Yes, I am.

Q. What?

A. The American Society of Civil Engineers. I am a registered professional engineer in the District of Columbia. I am a member of several highway research board committees, namely, a member of the Committee on Highway Capacity, Secretary of the Committee on Guardrails and Guideposts, and Secretary of the Committee on Geometric Design.

Q. Now, what is your present employment or occupation?

A. I am with DeLeuw, Cather & Company, Chicago.

Q. And how long have you been associated with DeLeuw, Cather & Company, in Chicago?

A. Since August 15, 1956.

Q. 1956?

A. Yes, this year.

Q. And immediately prior to your becoming associated with the DeLeuw, Cather & Brill, what was your business?

A. I was a highway engineer with the U. S. Department (3400) of Agriculture, Bureau of Public Roads, for over twenty years.

Q. From 1936——?

A. From February 1, 1936.

Q. And during the time that you served as a member of the staff of the Bureau of Public Roads, what were your activities in the Bureau?

A. Well, they might be divided into three phases: One, in a consulting capacity on matters relating to geometric design, to State Highway Departments and to the Bureau of Public Roads Division and District offices; two, you might say, in a teaching or training capacity, in conducting schools relating to geometric design, highway capacity, and arterial highways in urban areas. These courses were given to highway engineers and traffic engineers in State Highway Departments and in the District and Division offices of the Bureau of Public Roads. Three, assignments, special assignments, having to do with design development, mainly in developing design standards, criteria, and design

techniques for the American Association of State Highway Officials. The latter actually took most of my time in recent years.

Q. Now, was your work in the Bureau in connection with (3401) highways?

A. Yes, at all times.

Q. And, did you have to do with the design of highways?

A. Yes, I did.

Q. Now, did you during the time that you were associated with the Bureau of Public Roads make any special studies in connection with your work in the Bureau?

A. Yes. That is the work that I mentioned in connection with the American Association of State Highway Officials. It had to do in the development of design policies, which were culminated in two publications of which I was the principal author. One is "A Policy on Geometric Design of Rural Highways," published by A. A. S. H. O. in 1954, and the other, "A Policy on Arterial Highways—Urban Areas," now being printed by A. A. S. H. O. It is a companion volume to the first text that I mentioned.

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(3403) Mr. Rhoads: I offer, if Your Honor pleases, to prove by this witness, Mr. Leisch, that he

> "is a registered professional engineer, a member of the American Society of Civil Engineers; Secretary of the Committee on Geometric Design, a member of the Committee on Highway Capacity, and Secretary of the Committee on Guardrails of the Highway Research Board. He is now associated with the firm of DeLeuw, Cather & Brill, consulting engineers, and for twenty years prior to August, 1956, (3404) served as an engineer for the United States Bureau of Public Roads. His most recent assignment with the Bureau was Chief of the Design and Development Section. During the past ten years he acted in a consulting

capacity on special design problems to state highway departments and bureau of public roads division offices. In connection with a project for the American Association of State Highway Officials, Mr. Leisch made a special study, over a period of many years, of the effects of driver behavior and vehicle characteristics on traffic operation and geometric design of highways, with emphasis on traffic. This work culminated in the publication of two important books, of which Mr. Leisch was the principal author. They are: 'A Policy on Geometric Design of Rural Highway,' A. A. S. H. O., 1954, and 'A Policy on Arterial Highways—Urban Areas,' to be printed soon by A. A. S. H. O. These two volumes have been adopted by the States as national design policies and will be used as standards for the development of the huge thirteen-year Federal highway program.

"Defendants offer to prove through this (3405) witness, the following:

"1. Trucks, because they are generally wider, longer, and higher than passenger cars, and because of their lower speed of operation, have a significant effect on the geometric design of highways, requiring larger dimensions and over-all higher standards than are required for passenger cars. The result of these higher standards is materially increasing the costs of highway construction.

"2. Geometric design features are those involving widths, grades, overhead clearances, and other factors not directly related to the strength of the highway.

"3. Among the geometric design features affected by large trucks are the following:

"(a) *Pavement width.* The width of vehicles is an important factor in the determination of widths of traffic lanes and pavements since, over the road, trucks

are wider than passenger cars, a greater width of pavement is required to accommodate them. On two-lane rural highways where traffic is composed entirely of passenger cars, a (3406) twenty-two foot pavement is sufficient. When trucks are present in a significant volume, however, the width must be increased to at least twenty-four feet.

"(b) *Structure clearances.* A greater vertical clearance from the road surface to the ceilings of tunnels, the portals of truss bridges, and in the placement of overhead signs, etc., is required on roads subjected to truck traffic because of the greater heights of such vehicles. On facilities limited to passenger cars, 12.5 foot clearances are permitted. Where truck traffic is anticipated, the vertical clearance must be at least fourteen feet. This 1.5 foot difference in design standards frequently results in the necessity of using more structural materials for overpasses, and in lengthening connecting ramps, or increasing the amount of excavation.

"(c) *Highway grades.* Because of their low ratio of horsepower to load carried, most trucks now in use are incapable of maintaining reasonable speeds on sustained grades. This results in traffic congestion and may become hazardous when (3407) motorists become impatient and attempt to pass when it is not safe to do so. As a result, extensive excavating and filling operations become necessary in order to reduce the critical length of grades.

"(d) In areas where it is not feasible to reduce the critical length of grades, 'climbing lanes' must be constructed for use by the trucks. This increases the width of a two-lane highway by one-third and may double in places where 'climbing lanes' on opposite sides of the hill overlap at the crest.

"(e) *Intersections.* When truck traffic is encountered in volume, the paved areas of intersections and interchanges must be expanded considerably. This results from the fact that trucks have a greater radius of turn and because of their 'off-tracking' characteristics. A truck eight feet wide occupies an area 20.6 feet wide when making a sharp turn. A passenger car, on the other hand, is 6.5 feet in width and occupies an area of 10.3 feet wide in making a turn.

"(f) *Median widths.* The unpaved central (3408) median in divided highways must be considerably wider when large trucks are encountered. The median must be wide enough to permit the long vehicle to pull out of the traffic stream when crossing the highway or making left turns. Wider medians mean greater costs for the acquisition of rights of way and for grading, excavation, etc.

"(g) *Sight distances.* Because of their lower rate of acceleration and their greater length, trucks require more time than passenger cars to cross a highway. As a result, they must have greater sight distances to insure a safe crossing. This results in greater costs for landscaping, clearing obstructions, grading, etc.

"(h) *Extra lanes.* Large trucks sharply reduce the practical traffic capacity of highways. As a result, extra lanes must be constructed when truck traffic increases. This is particularly true in hilly or rolling terrain, such as is encountered in many parts of Pennsylvania.

"4. The changes in geometric design standards listed above result from the presence of truck traffic on the highways. Each of these changes increases the total cost of highway construction. (3409) When the occurrence of truck traffic necessitates the widening of a two-lane highway to four lanes, the cost of construction and maintenance may be doubled."

That, sir, is substantially the proof which we propose to develop through the witness who is now on the stand, and all of it, as Your Honor sees, goes to the so-called geometric design of highways, which, as Your Honor knows, is distinct from the structural or pavement phases of the highway.

• • •

(3410) RICHARD T. CASH, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rhoads:

Q. Mr. Cash, where do you live, sir?

A. 266 Douglas Avenue, Elgin, Illinois.

Q. And what is your present business or profession?

A. Highway engineer.

Q. And could you give us a resume of your educational background?

A. I graduated from high school in 1906, attended the University of Kentucky until my junior year, in 1911, and then I went to work. I am a registered professional engineer in Illinois.

Q. And when did you become a registered professional engineer in Illinois?

A. About ten years ago.

Q. And are you a member of any professional societies or associations?

A. Yes.

Q. And what are they?

A. I am a member of the Illinois Society of Engineers, (3411) the National Society of Professional Engineers, the American Association of Engineers, and the Illinois Association of Highway Engineers.

Q. And with what firm or organization are you presently connected?

A. DeLeuw, Cather & Company, of Chicago.

Q. And how long have you been associated with that organization?

A. Since April 19, 1955.

Q. And by whom were you employed before that?

A. I was employed for 38 years by the Illinois Division of Highways.

Q. In what capacity, sir?

A. Starting with resident engineer and becoming assistant district engineer, and the last 23 years of my employment, I was district engineer in two different districts.

Q. And which districts were they?

A. That was two years at Elgin, Illinois, eight years at Paris, Illinois, and the last 13 years at Elgin, Illinois.

Q. Now, could you tell us what were your duties as district engineer?

(3412) A. I had general supervision of all the activities in eight counties in the Elgin District, and twelve counties in the Paris District. That supervision involved the handling of seven different bureaus, Design, Construction, Maintenance, Materials, County Roads and City Streets, Research and Planning, and Traffic.

* * *

(3417) The Court: I think we have his qualifications.

Mr. Rhoads: Yes, sir. And I offer to prove by him, after his qualifications have been established, the following:

(3418) "1. Increases in traffic accompanied by increased speed and capacity of vehicles have created highway problems and necessitated highway design, construction and maintenance changes. Heavy commercial vehicles, meaning those with single axle loads in excess of 18,000 pounds, cause serious pavement damage unless pavement thickness and subgrade support are increased in order to carry such heavier loads. While

an engineer can design roads to carry almost any volume or load safely, the cost of such a road would be enormous.

"2. *During Mr. Cash's term as* district engineer of District 1 at Elgin, Illinois, a continuing study of pavement damage on Section 344, State Bond Issue Route 54, was made under his supervision. This study was initiated because of the distinct differences in the character of the traffic using the two opposing traffic lanes and in the resulting behavior of the pavement slabs. This difference was the result of a large number of tank trucks and combinations carrying heavy loads of petroleum products from refineries in the northbound lane and returning empty in the southbound lane. The study concluded that the similarity (3419) of all other conditions affecting the behavior of the pavement on the two lanes of this section of highway provided conclusive evidence that the greater damage and more extensive failure of the northbound lane was directly attributable to the excessive axle loads operated in that lane.

"3. As the result of the severe winter of 1942-43, downward drainage caused a completely saturated subgrade under the pavement surface of practically all roads in the northern tier of eighteen counties of Illinois. This subgrade condition resulted in extensive damage to pavement surfaces on the roads which were classified as truck routes while those roads which were classified as passenger car routes in practically all cases carried traffic satisfactorily under the same subgrade conditions.

"4. In 1919 and 1920 Mr. Cash was division engineer in charge of the construction of 40 miles of concrete pavement on Route 24 between Springfield and Peoria. At the time this section of road was opened to traffic and for several years thereafter, commercial

traffic did not increase materially in volume or weight. By the time commercial traffic (3420) increased to a point where it became an appreciable factor in the use of highways, other roads which were built to higher standards were in existence between these two cities; and therefore, the commercial traffic used these roads and avoided Route 24 because of its functional deficiencies. Due to the absence of heavy commercial traffic on Route 24, the thirty-six year old pavement is still in good conditon today without having been resurfaced or patched extensively while the other roads, even though constructed to higher standards, have failed extensively through use by heavy commercial traffic.

"'5. From 1935 to 1943 as district engineer of District 5, Illinois Division of Highways, Mr. Cash supervised the maintenance of over 1,500 miles of state and county pavements including 100 miles of county pavements in Vermillion County, which had been built in 1916. These roads have for forty years been subject to use primarily by passenger car traffic and normal farm-to-market loads. As a result of this type of traffic, a large portion of these county roads is still in good condition. A (3421) few miles of this system have been replaced where industrial development has taken place and the original pavement could not carry the heavier loads induced by such development.

"6. In 1935 and 1936 U. S. Route 41 was constructed from the Cook County line north to the Wisconsin state line. The design of this road was considered at that time to represent the most modern thinking on road design. As a result of the location of this section of road, it was one of the heaviest traveled in the state. By 1951 the pavement on this route had deteriorated to a point where it became necessary to rehabilitate it in order to save the original investment.

A large portion of the cost of rehabilitating this section of highway can be attributed to the extraordinary amount of heavy commercial traffic using this road.

"7. In addition to the aforementioned specific examples of damage to pavements by heavy trucks, which was derived from Mr. Cash's personal experience, he has knowledge of studies in other states which substantiate his findings in Illinois.

(3422) "8. Increased use of highways by vehicles of ever-increasing sizes and weights have necessitated changes in highway design, construction and maintenance."

That is substantially the offer of proof which I hope to establish by this witness.

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## OFFER OF PROOF—GEORGE W. PEAK.

(3434) I therefore, with Your Honor's permission and with Mr. Kohn's agreement, make the following offer of proof with reference to the witness George W. Peak, presently a resident of Indianapolis, Indiana:

(3435) Mr. Peak, I will offer to show, is Director of Organizational Planning for the Public Service Company of Indiana.

He graduated from the University of Kentucky in 1934 with the degree of Bachelor of Science in general business administration and received a Master's degree in Government Management from the University of Denver in 1941.

In 1934 Mr. Peak was Research Assistant for the Bureau of Business Research of the University of Kentucky, assisting Professor James W. Martin, in his then capacity as chairman of the committee of the National Tax Association, to prepare a draft of a committee report on motor fuel taxation.

During the period from 1937-39 Mr. Peak served as Research Assistant, Division of Research and Statistics, Kentucky Department of Revenue and in 1941 he was Chief Administrator, Colorado Department of Revenue. From 1941 through 1954 Mr. Peak was associated with the firm of Griffenhagen & Associates, consultants in management, public administration and finance. During his association with this firm he occupied various positions as associate, senior associate, principal associate and finally directing associate.

While with Griffenhagen & Associates Mr. (3436) Peak directed (a) the preparation of the chapter on finance and taxation appearing in the report (dated November 1948) entitled, "A Highway Improvement Program for Illinois," prepared by Griffenhagen & Associates for the Illinois Division of Highways for transmittal to the Illinois Highway and Traffic Problems Commission; and (b) the preparation of the entire report (dated February 1950) entitled, "Highway Finance and Taxation in New York," prepared by Griffenhagen & Associates for the Citizens Public Expenditure Survey, Inc. of New York State.

Defendants offer to prove through this witness the following:

1. The principal questions concerned with the allocation of highway costs are first, whether to and how to provide the costs of providing highways as between the highway users and the non-highway users; second, how to divide the user share among the various classes of users and among the individual users of each class.

We will show that if it is determined that some portion of the total highway cost is to be borne by general taxpayers as a group, one logical method of arriving at this share is the "basic access method." This method rests on a theory that general taxpayers as (3437) distinguished from vehicle owners should bear the cost of access to property.

We will show that main thoroughfares are very costly and the basic access element forms only a minor percentage

of their cost so that the greatest share of the cost of these roads should be allocated to highway users as a group.

2. We will show that in dividing the user group share among the various classes of users and among the individual users of each class, the two leading methods that have been advocated are the "incremental method" and the "relative use method."

3. We will show that the "incremental method" entails the determination of successive increments of highway costs, over and above the cost of a basic highway suitable for passenger cars and light vehicles, that are attributable to larger and still larger vehicles on up the scale of vehicle sizes and weights. All vehicles then share in the basic highway costs; all vehicles except the passenger cars and the light vehicles share in the first increment of highway costs over and above the cost of the basic highway; and so on until the largest vehicles share in the last increment of cost. Thus, the largest vehicles bear all the last increment of cost and share in (3438) all the other increments of cost and in the cost of the basic highway.

4. We will show through this witness that the "relative use method" does not attempt to assess elements or increments of highway costs but rather measure the relative amounts of highway use and divides the total cost in proportion to these relative amounts. It is based on the premise that the highway user share of highway costs should be divided among the users in proportion to the relative use they make of the highways and that the two principal factors in the measurement of highway use are the distance operated and the gross vehicle weight. This method does not attempt to distribute any one element of highway cost among vehicles. It holds the various elements of highway cost to be joint and inseparable, practically speaking, and it therefore attempts to allocate the total on the basis of reasonable indexes of highway use.

5. We will show through this witness that the "incremental method" and the "relative use method" are not basically inconsistent one with the other.

6. We will show that the "incremental method" and the "relative use or weight distance method" take into consideration one of the major factors which the engineering evidence demonstrates is largely responsible (3439) for the cost of maintenance and reconstruction of existing highways and the cost of constructing new highways, gross vehicle weight, of which axle loads are a function. The weight distance method, however, in addition, embraces another engineering fact responsible for these increased highway costs, distance, of which number of applications of loads are a function.

7. We will show that the "incremental method" is more complicated to apply than is the "relative use method."

8. We will show by this witness that under the "incremental method" when a total cost responsibility for a given vehicle class has been determined, the division of this responsibility among the various vehicles in that class can be attained on a vehicle registration basis or on a vehicle mile basis or on a weight distance basis. It would seem that the most equitable way of accomplishing this allocation would be on the weight distance basis.

9. We will show by this witness that it has been widely, but erroneously, assumed that the "relative use method" yields a higher cost allocation to the heavy vehicle groups than does the "incremental method."

10. We will also show that both the (3440) "incremental method" and the "relative use method" have been widely used. In the so-called Federal Coordinators' report, the "incremental method" was relied upon. A later federal study by the Congressional Board of Investigation and Research rejected the "incremental method" as imprac-

tical of application and employed the "relative use method." The "incremental method" has been attempted in studies in such states as Ohio, Oregon and others, while the "relative use method" has been used in studies in such states as Illinois, New York, New Jersey, Ohio, California, Washington, Michigan and others. A study in Virginia employed both methods.

11. We will show by this witness that any method of allocating the highway user share of highway costs among the individual users should be based upon the criteria of equity, simplicity and practicality of application. The "incremental method" fails almost completely to meet the tests of simplicity and practicality. The relative use method is not only equitable but also meets the tests of simplicity and practicality.

12. We will show by this witness that the impact of highway user taxes generally on vehicles of various classes is described in a study of 1952 tax data by the Division of Research of the Bureau of Public Roads. (3441) The results of the study were reported in a paper entitled, "Estimate of Highway Taxes Paid by Vehicles in Different Type and Weight Groups," published in the June, 1954, issue of Public Roads. This study shows that heavy vehicles are not paying their fair share of highway user taxes in the states encompassed in the study.

13. We will show that a study published in the October, 1956, issue of Public Roads entitled, "Highway-User Tax Schedules Recommended in State Highway Finance Studies," also demonstrates that studies in a number of states reached the conclusion that heavy vehicles do not pay their fair share of highway taxes.

14. We will show that studies made in the States of Oregon, California, Washington, Illinois, Michigan, Ohio, New York, New Jersey, and Virginia reached similar conclusions.

15. Finally we will show by this witness that the witness will state that, in his opinion, irrespective of which theory is applied, i.e., the "incremental" or the "relative use" theory, that heavy trucks do not bear their fair share of costs of construction and maintenance of our highways.

That sir, is the offer of proof which I desire to make in the case of the witness George W. Peak.

* * *

## OFFER OF PROOF—DR. BURTON N. BEHLING.

(3443) Mr. Rhoads: If Your Honor please, in line with my statement a moment ago, and under the same situation as to convenience of Your Honor and agreement of Mr. Kohn, I now present the offer of proposed proof of Dr. Burton N. Behling, who if called would testify as follows:

Dr. Behling, the witness, is an economist. His full name is Dr. Burton N. Behling.

His educational background includes graduation from Lawrence College of Appleton, Wisconsin, in 1928 with the degree of Bachelor of Arts. He received in due course a master's degree from the University of Illinois in 1929, and in 1931 he received the degree of Doctor of Philosophy, also from the University of Illinois. All of his graduate study and the majority of his under-graduate work was in the field of economics.

Dr. Behling was a member of the faculty of the University of Illinois from 1931 to 1938 during which time he taught in the field of transportation, public utilities, corporate finance and the principles of economics. From 1936 to 1938, Dr. Behling was a member of the faculty of the graduate school of the University of Illinois.

From 1939 to 1941 the witness served with the Interstate Commerce Commission as Economic Statistical Analyst.

(3444) From 1941 to 1944, Dr. Behling served with the Board of Investigation and Research, a temporary agency created by Congress to investigate transportation. He was

director of that section of the investigation which concerned itself with Public Aids to Domestic Transportation. The report of this section, of which Dr. Behling was the principal author, is embodied in House Document 159—79th Congress.

We will show that from 1944 to 1948, Dr. Behling served as Special Assistant to the Federal Power Commission, in which capacity he directed the nationwide natural gas investigation, and was the principal author of the report resulting from this investigation.

From 1949 to 1954, Dr. Behling served as Senior Transportation Specialist in the Legislative Reference Bureau of the Library of Congress. The Legislative Reference Service is an arm of Congress, the purpose of it being to assist members of Congress in respect of legislative matters which concern them.

Since August of 1954, Dr. Behling has held the position of Economist with the Association of American Railroads, and in that capacity has appeared as a witness for the railroad industry in the Congressional hearings during 1955 and 1956 on the National Highway Bill, which eventuated in the passage of the Highway Act of 1956.

(3445) In addition to the reports which have been mentioned, Dr. Behling is the author of "Competition and Monopoly in the Public Utility Industry" published in 1938 and of numerous articles in economic journals.

The defendants offer to prove, if Your Honor pleases, by this witness, the following:

1. The matter of the equitable allocation of highway costs is of vital importance to the public generally. The basic issue is whether highways should be paid for by highway users or by the general taxpayer. The witness will show that it is unsound to finance with general funds the provision of transportation facilities for a clearly identifiable segment of the public, such as, users of highways. As the direct beneficiary, highway users are the logical source of funds to meet whatever costs may be incurred.

2. The financing of highways from general funds diverts such funds from many other governmental functions that can be supported only by general funds; e.g., national defense and education. Highways today are in large measure commercial traffic arteries and should be paid for on an economic basis in keeping with the fundamental principles which run throughout the nation's price and cost economy.

(3446) 3. A direct or indirect subsidy to any form of transportation is contrary to the public interest in that:

a. If it could be extended impartially to all modes of transportation, its benefits would necessarily be unevenly divided among the taxpayers at whose expense it was provided.

b. It cannot be distributed impartially among the various agencies of transportation.

c. Users are not in a position to choose the form of transportation which they desire based upon the true cost of providing such transportation.

d. Competitive relationships within the transportation system are distorted.

e. The relative economy and fitness of the alternate types are not truly reflected.

f. An uneconomical allocation of capital is encouraged.

g. Distributions of traffic will depart from true economic standards.

h. Waste of public funds is difficult to check.

i. Questions of equity as between general taxpayers who foot the bill and users of transportation (3447) who get the benefits are presented.

4. We offer to prove by this witness that the policy of the Executive Department of the Federal Government as declared by the President of the United States in his Budget

Message of January 21, 1954, and his message to Congress on the National Highway Program of February 22, 1955, is that federal facilities, particularly highways financed through federal funds, should be paid for by the users of these facilities.

5. Based upon studies made by the witness Behling, we will show that large commercial vehicles, in particular heavy trucks, do not pay an equitable share of the cost of maintenance, reconstruction and construction of highways under the principle of relative use of the highways.

6. The relative use theory, or weight-distance method, is predicated not alone upon economic theory but embraces the overwhelming engineering evidence that substantial increases in the cost of maintaining and reconstructing existing highways and constructing new highways result from two factors: heavy gross weights of trucks, of which heavy axle weights are a function, and frequency of application of heavy weights. It also reflects the engineering fact that (3448) the geometric design of highways is affected by large trucks so as to materially increase the cost of construction of such highways.

7. There is substantial basis for concluding that under current conditions all of the cost of maintenance and construction of highways should be borne by the highway user and not by the general taxpayer.

8. Studies have been made in a number of states, and with almost no exception this witness will show it has been concluded in such studies that heavy trucks do not pay an equitable share of the cost of maintaining and reconstructing existing highways and constructing new highways. Among the studies which have reached this conclusion are those made in Oregon, California, Washington, Illinois, Michigan, Ohio, New York, New Jersey and Virginia.

9. This witness will show that based upon available data from the Interstate Commerce Commission, furnished

to the Commission by the motor carriers operating in the Eastern District for the period 1949 through 1954, heavy vehicles operating in this district for these years have paid only approximately one half of the amount which they should have paid in compensatory highway user taxes.

(3449) 10. We will show that based upon data published by the U. S. Bureau of Public Roads, for the years 1953 and 1956, in the states of the Eastern District on a state-by-state basis heavy vehicles have paid less than one-half of the amount which they should have paid in compensatory highway user taxes. Thus, these two studies using different sources of data closely conform to each other.

11. We will show that if the carriers operating in the Eastern District had paid the deficiency in user taxes properly allocated to them, their operating expenses in the period 1949 through 1954 for all common carriers of general freight would have been increased between 4 and 6 per cent, and for common carriers of general freight operating with owned equipment principally would have been increased about 4 per cent. Such carriers would have been required to increase their rates on the same percentage basis in order to preserve their margin of income.

If Your Honor pleases, I just want to make it perfectly clear in connection with this offer and the immediately preceding one, that not only do we consider the offers are relevant in connection with the defense asserted by the railroads in this case, but, of course, to the very (3450) basis of the counterclaim which has been asserted by some of the defendants. In other words, we feel the relevancy has a twofold basis, which I think I have presented, and it has been presented by Mr. Price as well. I wish to repeat it emphatically at this moment.

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(3469) WARREN K. MYERS, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Rhoads:

Q. Mr. Myers, where do you live?

A. 3320 North Second Street, Harrisburg, Pennsylvania.

Q. How old are you?

A. Fifty-six.

Q. What is your business?

A. Civil engineer.

Q. How long have you been a civil engineer?

A. I have been practicing since 1923.

Q. Are you a member of any firm or organization?

A. I am presently a partner in the firm of Grof & Myers.

Q. What is the character of the work of that firm?

A. Principally the design and preparation of plans for highways, bridges, and airports.

Q. How long have you been a member of that firm?

A. Since July, 1955.

Q. Will you be good enough to tell me what has been your professional career prior to your becoming a member of the firm of Grof & Myers?

A. From 1923 to 1950, with two interruptions, I was employed by the Pennsylvania Department of Highways.

(3470) Q. What years?

A. From 1923 to 1950, with two interruptions.

Q. What were those interruptions?

A. 1926 to 1929 I was employed by the Ebersole Engineering Company.

Q. What were you doing with Ebersole?

A. The design and installation of quarry equipment.

Q. And you said there was another interlude that occurred between 1923 and 1929. What was that?

A. Between 1935 and 1939.

Q. Between 1935 and 1939. What was it?

A. I owned and operated the Allied Asphalt Company at Pittsburgh, Pennsylvania.

Q. What was the business of that company?

A. The construction of roads and streets.

Q. Following 1950 and before you became associated with your present firm, did you have any other business connections?

A. In 1950 I went to Florida and designed and had charge of construction of the broad causeway between Miami Beach and North Miami, across Biscayne Bay.

Q. During the time that you were with the Pennsylvania Department of Highways, which, broadly speaking, was between 1923 and 1950; is that correct?

(3471) A. That is correct.

Q. What positions did you hold in the Department of Highways of the Commonwealth?

A. Well, in the construction unit I held a number of positions from assistant inspector, assistant engineer, district engineer, and then I was assistant chief engineer.

(3472) Q. During the time that you are now speaking of, did you have any responsibility for the maintenance of highways in the Commonwealth?

A. During the same period I filled all of the jobs in the maintenance unit. I was an assistant maintenance superintendent, a maintenance superintendent, a district maintenance engineer, assistant chief maintenance engineer and chief maintenance engineer.

Q. Did there come a time when you became Deputy Secretary of Highways?

A. Yes. In 1943 I was appointed a Deputy Secretary of Highways under Secretary Shoyer.

Q. For how long did you hold that job or that position?

A. From 1943 to 1950. That was concurrently with my position as Chief Maintenance Engineer.

Q. And during the time that you were Deputy Commissioner, Deputy Secretary of Highways, what were the responsibilities that were incident to that office?

A. The responsibilities of Deputy Secretary were principally signing documents for the Department of Highways and representing the Secretary at his request.

Q. What was the responsibility, what did the (3473) responsibility you are talking about involve so far as the state highway system is concerned?

A. Well, my principal responsibility in that position from 1943 to 1950 was the responsibility for the maintenance of the entire state highway system, consisting of approximately 41,000 miles of state highways.

Q. That was during that seven-year period you were speaking about?

A. That is correct.

• • •

(3475) By Mr. Rhoads:

Q. Can you tell us, Mr. Myers, when in your own experience the effect of heavy trucks on the roads of the Commonwealth of Pennsylvania became apparent?

Mr. Kohn: That is objected to, sir. I think in view of the continued line we probably ought to have an offer of proof, if Your Honor is willing.

Mr. Rhoads: If Your Honor pleases, I am prepared to ask a series of questions, and I will, of course——

The Court: I don't want to interrupt you, Mr. Rhoads, but I think I have made myself particularly clear that I will accept no further testimony in this case regarding the effect of trucks on roadway surfaces.

• • •

(3502) Q. Now, referring to Exhibit 120 which is before you, will you tell us what types of roads indicated on that (3503) chart, 120, were designed for axle loads of 18,000 pounds or over.

Mr. Kohn: Objected to, sir.

The Court: Read the question back.

(The reporter read the pending question.)

The Court: I sustain the objection.

Mr. Rhoads: Does Your Honor wish me to give you an offer of proof, sir, on that particular point at this time?

The Court: If you care to protect your record, Mr. Rhoads.

Mr. Rhoads: Well, I simply would like to show by the question which I have asked and the answer which would indicate that none of the roads in the category of unimproved and like type roads which the witness will describe, were designed for axle loads of 18,000 pounds or over, and that in the opinion of the witness only about 10 per cent of the roads in the type which he will describe as high type flexible category were designed to carry loads of 18,000 pounds or over.

The Court: Very well. An objection has been made and sustained.

Mr. Rhoads: I then further offer to prove, in view of Your Honor's ruling, that approximately 85 per (3504) cent of the total category of roads, including local and state highways, highway system, are not designed for such traffic.

Mr. Kohn: The same objection, sir.

The Court: The same ruling.

By Mr. Rhoads:

Q. Mr. Myers, may I just ask you the general question? What is the state highway system? I don't know whether you have told us that or not.

A. The state highway consists of roads that have been adopted by the legislature as a part of the state highway system.

Q. Mr. Myers, will you refer to the Biennial Report for 1948 and 1950. I think it is before you, is it not?

A. Yes.

Q. Do you have it before you?

A. I have it, sir.

Q. Will you refer to page 1 of the Biennial Report for that year, 1948 and 1950?

A. Yes, sir.

Q. Is there a chart on page 1 of that report?

A. There is.

Q. What is that chart?

A. The chart is the "Age of Pavements, Rural Primary (3505) State Highway System."

Mr. Rhoads: I ask that the table identified by the witness on page 1 of Exhibit 119-D be marked for identification as Exhibit 121.

(Chart on page 1 of Exhibit 119-D was marked Exhibit D-121 for identification.)

By Mr. Rhoads:

Q. Mr. Myers, have you at my request made an enlargement of that chart?

A. I have.

Q. Is that the enlargement before you?

A. That is.

Mr. Rhoads: I will ask that to be marked for identification as Defendants' Exhibit No. 122.

(Enlarged chart entitled "Age of Pavements, Rural Primary State Highway System," was marked Exhibit D-122 for identification.)

By Mr. Rhoads:

Q. Except for the fact of enlargement is that in other respects an accurate copy of the chart on page 1 of 1948?

A. It is with the exception that I added the year 1950 to identify it.

Q. Underneath?

A. Underneath the chart, yes.

(3506) Q. What does that chart show, Mr. Myers?

A. That chart shows the age of the pavement on the state highway system, on the rural primary state highway system. It shows that 17 per cent of the pavements in 1950 were less than 10 years old, and that 83 per cent were over 10 years old.

Q. What significance do you draw from the age of the roads as revealed by the chart which you have just identified?

Mr. Kohn: Objection.

The Court: Sustained.

Mr. Rhoads: I simply wanted to show by this witness and questions which I would propound with reference to the chart that a vast percentage of the roads of the Commonwealth of Pennsylvania are of an age too old to sustain the kind of traffic to which they are being submitted at the present time by virtue of the heavy truck traffic.

Mr. Kohn: That is objected to, the offer of proof is objected to, sir, if that be an offer of proof.

Mr. Rhoads: Well, I intended it, sir, merely as a short cut of an offer of proof. Indeed I did, Mr. Kohn.

The Court: I will sustain the objection to the offer.

By Mr. Rhoads:

Q. Mr. Myers, what is the significance of the fact that a (3507) substantial amount of the roadway in Pennsylvania was not designed to carry axle loads of 18,000 pounds or more, when considered in conjunction with the increase in the numbers of trucks and combinations and their axle loads?

Mr. Kohn: That is objected to, sir. Mr. Rhoads apparently forgot that the other question wasn't permitted to be answered.

The Court: Read the question back, Mr. Comer.

(The reporter read the pending question.)

The Court: I sustain the objection.

Mr. Rhoads: If Your Honor pleases, I wish to show by this witness, through the type of questions intended to be propounded, the deterioration and the enhanced or accelerated deterioration resulting from the use by heavy trucks of highways not designed for that purpose.

Mr. Kohn: I object to the offer and the evidence, sir.

The Court: I will sustain the objection.

By Mr. Rhoads:

Q. Mr. Myers, during the time that you were deputy secretary of highways was any study conducted under your direction regarding the effect of carrying heavy loads of coal on the highways of the Commonwealth?

(3508) A. Yes, sir, it was.

Q. When was it made?

A. In 1948.

Q. In 1948; is that right?

A. I think that is correct, 1948.

Q. What counties did that study cover?

A. It covered 19 counties in which coal operations were carried on.

Q. And what type of traffic was studied?

A. Principally heavily loaded trucks, principally carrying coal in that instance.

Q. And specifically was the study referable to particular counties in the Commonwealth?

A. Yes, sir.

Q. What was the result of that study?

Mr. Kohn: Objection.

The Court: We are going right back to the same question, Mr. Rhoads. I will sustain the objection.

Mr. Rhoads: If Your Honor pleases, I desire at this time to elicit by this witness proof that some 495 miles of road in these counties were affected adversely by the heavy loads of coal trucks, and that damage resulting therefrom approximated some 12 million dollars.

• • •

(3518) Mr. Rhoads: If Your Honor pleases, may I make a brief offer of proof just to cover the last part of this witness's testimony, particularly with reference to the map.

I intend to show by this witness, by referring to D-123, that at the eastern end of the Turnpike there is a section of about 11 miles on U. S. Route 11 which serves as an access road to the Turnpike, for vehicles traveling toward the west on the Turnpike, and an exit road to the east for vehicles leaving the Turnpike. I would show by this witness that in 1949 the average daily traffic count showed 2,067 commercial vehicles, of which 1,031 were semi-trailer combinations.

I will show that pumping joints required subsealing and resurfacing at an average maintenance cost of some $4900 per mile, and that just west of the entrance to the Turnpike there is a section of 2 miles or so on Route 11, the same road, where the 1949 average daily traffic count was some 1,069 commercial vehicles, of which 286 were semi-trailer combinations, that at this point on this occasion there were no pumping of joints and that the average maintenance cost was $325 a mile.

I will also show that as to the western end, (3519) the western terminus of the Turnpike over toward the left is at a place called Irwin, and that Route 30, the Lincoln Highway, leads both westward and eastward from this point; that trucks leaving the Turnpike travel westward from Irwin and that the maintenance costs from Irwin to Wilkinsburg became excessive, amounting to the following, and I will merely give the figure

in 1941 of $15,000, and in 1949 some $538,000; and I wish to show, if Your Honor pleases, by further illustrations from this witness and by visual photographs the result of heavy traffic which came to his observation in various sections of roadway in the Commonwealth of Pennsylvania.

* * *

## OFFER OF PROOF—CHARLES E. DeLEUW.

(3538) Mr. Rhoads: Now, if Your Honor pleases, I have but one further offer of proof which I would like to present to Your Honor to complete our record, and I am presenting this offer of proof of Charles E. DeLeuw on the same terms or suggestion which I made to Mr. Kohn yesterday with reference to Mr. Peak and Dr. Behling. He is not presently in court.

The Court: Is he the Mr. DeLeuw of DeLeuw, Cather & Brill?

Mr. Rhoads: Yes, sir.

(3539) And I offer to prove through the witness Charles E. DeLeuw that Mr. DeLeuw is a consulting engineer, currently a partner in DeLeuw, Cather & Brill of New York, President of DeLeuw, Cather & Company of Chicago, and Chairman of the Board of DeLeuw, Cather & Company of Canada, Ltd., Toronto.

That from 1919 to 1929 he was a partner in Kelker, DeLeuw & Company of Chicago, Consulting Engineers, and from 1929 to date President of DeLeuw, Cather & Company; that he has been a partner in DeLeuw, Cather & Brill since 1951 and Chairman of the Board of DeLeuw, Cather & Company of Canada, Ltd., since 1955.

I will show through this witness the vast experience of DeLeuw, Cather & Brill and DeLeuw, Cather & Company in the design and construction of highways similar to the offer of proof respecting Mr. Brill, and I shall not therefore repeat it here.

I will show that Mr. DeLeuw graduated from the University of Illinois in 1912 with the degree of Bachelor of Science in Civil Engineering, and received the professional degree of Civil Engineer; that he is licensed as a professional engineer in 29 states, including Pennsylvania, and is a member of the following engineering societies:

(3540) American Institute of Consulting Engineers
American Public Works Association
American Society of Civil Engineers
American Transit Association
American Water Works Association
Engineering Institute of Canada
Illinois Society of Engineers
Institute of Traffic Engineers
Society of American Military Engineers
The Institution of Civil Engineers
Western Society of Engineers

I will show that from 1933 to 1936 Mr. DeLeuw was Assistant Chief Highway Engineer for the State of Illinois; from 1935 to 1936 he was Director of the Illinois State Highway Planning Society; from 1936 to 1944 he was Consulting Engineer for the Department of Subways and Superhighways of the City of Chicago and occupied the position of Acting Chief Engineer from 1941 to 1944.

Substantively, I will offer to show through this witness the following:

1. That gross vehicle weight as distinguished from axle load is the principal determining factor in the (3541) carrying capacity of existing bridges and the design of future bridges.

2. That vehicles of greater gross vehicle weight are generally larger than those of lesser gross vehicle weight and therefore affect the geometric design of highways so as to make them more expensive.

3. That a given vehicle with a heavier load, and therefore a heavier gross vehicle weight, will have poorer operating characteristics, such as breaking and acceleration, than if it were carrying a lighter load, and that such poorer operating characteristics must be taken into consideration in various elements of geometric highway design, particularly gradients with resulting increased cost of construction.

4. That axle loads are a function of gross vehicle weight, and that on a given type of vehicle with a given number of axles the increase of the gross vehicle weight will necessarily increase the axle load on one or more of the axles.

5. That while gross vehicle weight may be increased without increasing axle loads, if the number of axles is increased, the frequency of application of axle loads is increased by the additional axle or axles, and, in addition, the axle loads will be applied, not only more frequently, but more rapidly.

(3542) 6. That while a gross vehicle weight of 60,000 pounds might not per se have a serious adverse effect on existing highways, such a gross vehicle weight accompanied by single axle loads in excess of 18,000 pounds or tandem axle loads in excess of 32,000 pounds would overtax design capacity and accelerate the deterioration of 85 per cent of the existing mileage in the area east of the Mississippi and north of the Potomac Rivers.

7. That a great many bridges in the area east of the Mississippi and north of the Potomac Rivers were never designed to carry gross vehicle weights of 60,000 pounds.

• • •

## EXCERPT FROM GOVERNOR FINE'S HEARING HELD JANUARY 17, 1952.

Mr. Price: If Your Honor please, I have here a transcript of the Governor's hearing held on January 17, 1952, as reported by E. E. Moyer, chief official reporter of the House of Representatives. I should like to read that into the record, sir. Mr. Kohn has said that he would not (3543) require the presence of Mr. Moyer himself, who couldn't be here today, to identify the fact that he took it.

I have a transcript here which has been certified by him. It was taken by a reporting device, reporting tape, and transcribed by him and his assistants under his supervision.

The Court: Taken where and when?

Mr. Price: At the Governor's hearing held January 17, 1952.

The Court: This is a transcript of the hearing before Governor Fine?

Mr. Price: Yes, sir.

The Court: All right, you may read it.

* * *

(3585) Mr. Segal: Your Excellency, please, I am appearing as counsel for the Pennsylvania Motor Truck Association which is the only state-wide freight organization in the Commonwealth representing the owners and operators of commercial motor vehicles. It is the largest State association of its kind and is affiliated with the American Trucking Association. It numbers among its members thousands of owners and operators of trucks for hire as well as the great industrial, manufacturing and commercial concerns in this Commonwealth which operate trucks to carry their own goods.

Preliminarily, I want to say two things which may be obvious to your Excellency, and I will be very brief on them.

First is, that in deference to your wishes and those expressed in your letter, we have written requesting all members to refrain from coming to this meeting except a few official representatives. We know that Your Honor is not going to be stampeded by that kind of demonstration.

• • • •

(3764) . . . I am not going to burden you with a re-explanation, except that I want to say in conclusion that most of the people who appeared here today appeared here without my knowledge—I never heard of them—and without the knowledge of the Association.

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(3970a) BURTON N. BEHLING, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

• • •

(3986) Q. Would you compare Table III with Table II, Exhibit 203 with Exhibit 202, with particular reference to the period starting in 1946, which of course is the beginning period of Table II and the middle period of Table III.

A. Yes. We saw for the railroads in the Eastern District—both of these tables, II and III, referred to the Eastern District only. The traffic of the railroads had a declining trend through this period. Their freight revenues were on a somewhat upward course. Of course, the explanation is the one that I just offered, that the freight revenues reflect increases in rate levels.

The same is true with reference to the trucks. Their traffic has grown as shown on Table II. Their revenues have grown more.

Q. What significance if any do you attach to the figures shown in Table III, showing so much larger increase in the trend of motor carrier revenues, freight revenues, than railroads?

A. It reflects the kind of traffic which the motor carriers principally carry, that is, what is often referred to as the cream traffic in the vernacular, the higher rate kinds of traffic.

Q. Are you familiar with the average rate per ton of the (3987) traffic handled by the motor carriers and the railroads as shown in this exhibit of Table III?

A. I think perhaps you mean per ton mile.

Q. Per ton mile, whatever the measure is.

A. Yes. The average revenue per ton mile of traffic for the trucks is about 6 cents. For the railroads it is about 1.4 cents per ton mile.

Q. Is that what you mean by the cream of the traffic?

A. The traffic that by and large carries the higher rates, yes.

* * *

(4075) JOHN C. McMICHAEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Price:

Q. Mr. McMichael, what is your occupation?

A. I am Assistant to the General Manager of Freight Sales and Services of the Pennsylvania Railroad.

Q. And how long have you been connected with the freight activities of the Pennsylvania Railroad?

A. I have been a full-time employee of the Pennsylvania Railroad since 1927, sir.

Q. And how long has it been in the freight field, field of freight?

(4076) A. 1927.

* * *

(4079) Q. In your position in the railroad at that time did you have anything to do with trying to retain traffic

on the railroads that either was there before or get new traffic that hadn't been there before?

A. That was the job for which I was being paid at that time. It was my—my duties were to develop (4080) traffic for the railroad and to make necessary rate adjustments to take care of business that it was necessary to adjust the rates in order to attract it.

• • •

## EXCERPT FROM DEPOSITION OF SAMUEL B. DENNISON.

CROSS-EXAMINATION.

(4750) By Mr. DeLone:

Q. Your full name?

A. Samuel B. Dennison.

Q. And where do you live?

A. 728 Main Street, Reynoldsville, Jefferson County, Pennsylvania.

Q. And what is your business, sir?

A. You mean what is my main occupation?

Q. What is your main occupation?

A. I am an automobile dealer.

Q. How long have you been engaged in that business?

A. Since 1923.

• • •

Q. You say that is your main business. What are your other (4751) businesses?

A. Well, I am presently employed as legislative consultant for the Pennsylvania Motor Truck Association.

Q. How long have you been so employed?

A. From the beginning of the 1953 session of the legislature.

• • •

(4783) Q. How about the automobile clubs during that period from 1941 to 1949?

A. There you got me. Keystone Automobile were very active, and when you speak of dinners—I ate more dinners on Keystone Automobile Club than any other organization in Harrisburg, and they were very much opposed to it. In fact, they paid my expenses for a trip down to view the Maryland Road Test. I spent two days—Mr. Canning and I—going over the Maryland Road Test.

Q. When was that?

A. That was in 1951.

Q. But they had entertained you frequently even before that had they?

A. Oh, yes.

(4784) Q. Were they very definitely opposed?

A. Very definitely opposed.

* * *

## EXCERPT FROM DEPOSITION OF H. L. GORMLEY.

### Cross-Examination.

By Mr. Price:

(5376) I would like, if Your Honor please, if I may be permitted to read from the depositions of Mr. Gormley which is along the same general subject that we have been considering here.

These are depositions taken on April 16, 1953, starting at Page 908, down near the foot of the page.

By Mr. Price:

Q. What are the funds that the P. M. T. A. operates with, or under, or by? Have you any major divisions of the receipts, assets, that is, income assets, of the P. M. T. A.?

(5377) A. Yes, sir.

Q. Will you describe those, please?

A. We have regular membership and we have sustaining membership. The sustaining membership operates the

public relations fund. The regular membership dues operates the general activities of the Association.

Skipping down five lines.

By Mr. Price:

Q. These regular dues of members were described by Mr. Goglin as carrying the ordinary operations of your Association?

A. That is right.

Q. And they are calculated on the basis of some formula which applies to the various classes of memberships?

A. That is right.

Q. Am I correctly informed that the regular dues do carry the normal operations of the Association?

A. Yes, sir.

Q. And any excess above the ordinary operating expenses——

A. We have never had any excess above regular operating (5378) expenses to the best of my knowledge.

Q. Then, do you have to use some of the sustaining membership money to carry the ordinary operations of the Association?

A. No, the operation is cut to the money there is available to operate.

Q. So your normal operations will exhaust whatever you get from dues?

A. That is right.

Q. But won't eat into the sustaining membership funds?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And the sustaining memberships, then, are devoted exclusively to public relations?

A. That is right.

Q. Which includes legislative activity, this litigation, and so on?

A. All types of public relations, safety activity—any community activities, any public relations, any advertising, telling our story, any pamphlets that are sent out, telling about the trucking industry, all these speakers that go out to talk about the trucking industry, all of that is under public relations.

• • •

## EXCERPT FROM DEPOSITION OF FLOYD B. NOERR

CROSS-EXAMINATION.

By Mr. Price:

(5463) Q. Well, if Senate Bill 615 had been passed, you would (5464) be in a stronger position to compete with the railroads than you are today, wouldn't you?

A. Yes, sir.

Q. Well, now, isn't it a fact that a very important part of the accelerated program of your Association through the years from 1941 to 1953 for increased truck weights was due to your desire to be put in a position to compete even more successfully than you do now with the railroads in the matter of rates?

A. Yes, to the extent that many commodities which have to do with movement in a commoditywise shipment—in other words, where the rails have rates that apply for minimum shipments beyond, far beyond what trucks seek or have—in those particular instances, the service of the trucking industry to the industry involved is restricted because of the inability of the motor trucks to compete on a rate basis because of the restricted amount of weight that they may carry on any one particular truck.

Q. Now, your desire to improve your competitive position has stimulated the matter of getting sustaining memberships and finally, in 1952, in the neighborhood—I won't hold you to the dollar figure—of a quarter of a million dollars for your legislative program, isn't that right?

A. Read that again? I didn't get the whole wording.

(5465) (The pending question was read by the reporter.)

The Witness: Yes.

Mr. Green: Wait a minute, he didn't testify that a quarter of a million dollars was raised for any legislative program at all. It was for a public relations program, of which the legislative feature was a part, and I don't think, again, that you are entitled to put words in his mouth.

Mr. Ingersoll: We will let the record speak for itself. We are not far wrong, we are not far apart, Mr. Green.

The Witness: On that basis, I would say that that was, some place in that neighborhood, was the overall picture of the industry's efforts at that time.

By Mr. Ingersoll:

Q. Would you agree that regardless of how you regard the method, that a vast amount of the activities which you complain of on the part of the railroads is an effort on their part to hold their competitive position, or even improve their competitive position, with respect to the competition of heavy trucks?

A. Well, I have never been critical of any kind of (5466) competition that was directly aboveboard and under the eye of the public or the people who are trying to be influenced, and I don't think that the two industries, in their competitive position, should be more than competing on their ability to furnish service according to rates and service.

I am not critical of competition. I am just critical of the means of obtaining the competitive angle.

Q. Well, is it an exaggeration for me to say that your effort to get 615 passed and signed by the Governor was to obtain authority to carry such weights as would drive the railroads out of a competitive position with respect to a considerable body of traffic?

A. No, sir. No, I don't believe so. I believe that our effort was to, in a small measure, make the truck industry competitive and available to industry itself.

Q. Well, if you gain your ends, you would have increased your profits, wouldn't you?

A. We hoped to, yes.

Q. And you would have been in a position to more actively compete with the railroads in relation to rates?

A. That is right, in relation to rates and services to the industry that is in Pennsylvania.

(5467) Q. And your not having attained your ends and the statute having been vetoed, the railroads retained the position as existed before the excitement; that is correct, isn't it?

A. Yes. I still claim that the industry has been hampered just to that extent.

Q. You want business, some of the business that the railroads now have, don't you?

A. Yes. There is a little larger pictures than just some of the business the railroads have. Again, the angle of development of the State of Pennsylvania is very definitely tied into transportation, and anything, regardless of what it is, that in some measure restricts transportation and the availability of the goods in or out of the state hampers the growth of our state and the good of everybody that lives in it.

* * *

(5473). Q. In paragraph 28 of the Complaint, it is averred that as the result of the conspiracy, the plaintiff's business was disparaged in the public mind and plaintiffs were impeded in the conduct of their business.

Have you any information about that with reference to the Noerr Motor Freight Company except what counsel told you?

A. Only generally. The disrepute on the industry as a whole reflects on individual operators within the industry. All things that make one segment of the industry look bad make the whole industry look that way.

Q. But have you any specific event or act or occurrence which is the basis of the averment that the plaintiff—that is, the Noerr Motor Freight in this case—was impeded in its business?

A. No.

Q. Or the P. M. T. A.?

A. No.

Q. It is also averred in the same paragraph that the plaintiffs were financially damaged as a result of the failure to pass beneficial legislation, or legislation (5474) beneficial to the plaintiffs. Have you any evidence of financial damage to the Noerr Motor Freight Company?

A. Yes. Generally there were many instances of additional costs of operation of the business due to the restricted weight limits permitted on vehicles. There was the business that could not be solicited because of the weight limitation, which also limited the rate that could be applied to the commodity. There were many times that four trucks had to be used to haul commodities that could have been handled with three trucks if the increased weights had been available.

There was a general overall cost of working under a hampered condition between movements for the commerce of Pennsylvania from the manufacturing point within the State of Pennsylvania out to places beyond the borders of Pennsylvania.

Also, there was the additional costs of moving of the commodities necessary to industry in Pennsylvania from points beyond the border into the manufacturer and user of these various commodities.

Q. Then all those classes of damage that you have referred to resulted from a continuation of the motor vehicle law in Pennsylvania as it has been for a number of years, and the failure to change it in accordance with either the (5475) 1949 Act or the 1951 Act?

A. That is right.

Q. You have no specific evidence or any specific piece of business that you can refer to in that connection, have you, Mr. Noerr?

A. Yes, I do.

Q. All right, will you name them, please?

A. I have authority from the Public Utility Commission, speaking of our own company, to move brick from our area of Lewistown to all points in the State of Pennsylvania. The restricted weight that is presently applicable to the movement of this commodity on the highways necessitates a higher per ton rate than would be possible if there were higher weights permitted. As a consequence, I have not been able to compete with the rail rates that are applicable to movement of brick from our area of Lewistown to other points in Pennsylvania.

I have, of necessity, had to file rates that were higher than the competing rate that the rail maintains from this area to other points in Pennsylvania, and, as a consequence, I have not been able to have this business, to add this business or part of it to our particular line.

Q. Any other instance?

(5476) A. That is a particular instance. I don't recall just others.

Q. You don't recall on any other commodity?

A. Yes, there is another commodity. There is a movement of chemicals from Philadelphia to Lewistown area that I have not been able to enjoy any part of, on account of the weight restriction relative to highway use, and also again the competitive rate has not been available due to the restricted amount of chemical that can be moved at one time.

Q. Anything besides bricks and chemicals?

A. That is all I can think of at the moment.

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**EXHIBIT P-3.**

July 13, 1949

Mr. Thomas J. Deegan, Jr.
Vice President—Public Relations
The Chesapeake and Ohio Railway Company
4500 Chrysler Building
New York 17, N. Y.

Dear Mr. Deegan:

We appreciate this opportunity to submit a proposal to represent your Committee.

We have no client interest which would in any way conflict with this work.

Carl Byoir & Associates, Inc. is an organization employing 160 people representing 16 clients. We maintain a staff of specialists in the following fields:

Business and financial news
Radio and television
Newsreel *and pictures*
Magazines
Women's Interest
Governmental Relations
Agricultural Relations
Merchandising
Special Promotions

We maintain completely staffed offices at New York, Chicago, Washington and Los Angeles. We have full time resident representatives in Boston, Philadelphia, Jacksonville, Detroit, Columbus, Minneapolis and Hamilton, Ont.

Since all of the members of your Committee are themselves expert in the field of public relations, I assume that it is not necessary to take your time here to make any presentation of our ability to secure adequate background publicity for the campaign you are planning.

Since, as we understand it, legislative action is necessary to obtain the objectives sought, we are outlining part of our record in this field.

*isiana lphur erance*

In 1936 the Louisiana Legislature, by unanimous vote in the House and with a single dissenting vote in the Senate, increased the sulphur severance tax from 60¢ a ton to $2. a ton. We were retained by the Freeport Sulphur Company to undertake to secure a reduction of this tax. The company was fearful that if the tax was not reduced, the state of Texas would increase its tax from $1.03 a ton to $2. a ton. Only these two states produce sulphur. In Louisiana our client was the only producing company and, of course, the only company subject to the tax.

We planned to campaign to show that the tax was not merely against the company but against the interests of the whole economy of the state. It was not merely a publicity campaign. It was a campaign of organizing all of those groups in the state which represented large segments of public opinion; persuading them to take a stand against the tax and permitting us to publicize their positions.

At the next session of the Legislature they not only passed legislation reducing the tax from $2. to the level of the Texas tax (of $1.03), but they passed it in the form of a constitutional amendment which meant that the tax could never again be increased without the consent of two-thirds of both houses rather than a simple majority.

In the general election the amendment was overwhelmingly adopted.

*ti-Chain re islation*

In the 1920's enemies of the chain stores began to attack the chains legislatively through discriminatory and punitive taxes. By 1937 fifty such taxes were in effect in 29 states. In that year alone 96 anti-chain bills were introduced in state legislatures and 7 were enacted into law.

At that point we were retained by the Great Atlantic & Pacific Tea Company to oppose a chain store tax bill in the New York State Legislature.

For the first time in the history of such legislation this bill was opposed openly, through an intensive campaign of public education. The farmer, consumer and industrial organizations throughout the state were informed of the extent to which their interests were adversely affected by the bill, and their opposition to it was organized. Mass meetings were held in key cities through the state, and an intensive publicity campaign reflected the mounting opposition to the bill.

The campaign culminated in the Spring of 1938, with the longest hearing ever held in the New York State Senate. Hundreds of representatives of farmers, consumers and businessmen appeared personally to oppose the tax. It died in Committee.

As a result of the success of this campaign, we were retained to oppose the Patman Anti-Chain Store Tax Bill in Congress and all such measures in state legislatures.

The Patman Bill provided such punitive taxes that its passage would have put the A. & P. out of business. When we were retained, 75 members of the House had already committed themselves to the Bill as co-sponsors.

Our employment was announced in a frank statement of public policy by the Company in a five column advertisement published in more than 1500 newspapers.

The Company frankly announced that it would not go into politics nor establish a lobby in Washington for the purpose of influencing the vote of any member of Congress, but would spend a substantial sum of money in a public education campaign to mobilize opinion against the Bill.

The Byoir organization immediately launched an intensive campaign designed to solidify the opposition of labor, agricultural, industrial and consumer groups to the proposed legislation. Hundreds of resolutions were adopted by such groups and publicized. A broad public relations program was undertaken to earn the support of all groups having a stake in continued chain store operation.

The fight culminated in 1940 in an open hearing lasting for six weeks before a subcommittee of the House Ways and Means Committee.

After the proponents of the tax had produced before the Committee twenty witnesses, practically all of whom were business competitors of the chains; 159 witnesses, of whom only 11 were chain store men, were arrayed against the Bill. These included 65 farmers and representatives of farm organizations, 8 prominent labor leaders, 50 representatives of manufacturers' organizations, manufacturers and marketing authorities, as well as representatives of consumer organizations, real estate boards and others.

It became increasingly apparent as the hearings proceeded that the proposed litigation was against the interest of millions of workers, consumers and agricultural producers throughout the country. The bill died in the subcommittee.

From that time until today we have opposed 247 anti-chain store bills, introduced in state legislatures. Only 6 passed and not one of those in states where such a tax was not already in effect. In the past 8 years not a single anti-chain bill has become law.

No new state has been added to the anti-chain roster since 1937.

Although 29 states have experimented with chain store taxes, only 16 states now have such laws on their books.

Since 1938 chain store taxes have been invalidated or repealed in 11 states.

*Industry ices, s, and ffs*

The price code and tariff problems besetting the manufacturers of floor and wall tile threatened the industry with extinction. We were retained by the tile industry to undertake the solution of these problems, as well as an increase in sales of its product.

Tile prices were decontrolled almost alone among building materials and amid the hue and cry for low-cost housing.

*affecting*

Code changes were obtained ~~in~~ 2000 cities.

Higher protective tariffs were granted to tile at a time when lower tariffs were being applied to some 3500 other items.

*Hughes Senate Investigation*

This case may be of interest to your Committee in its demonstration of our understanding of legislative processes and of the ability of a large specialized organization to capitalize maximum publicity possibilities of a situation in the news.

*The Grain Allocation Case*

In the Fall of 1947 the President secured a voluntary shut-down for 60 days of the distilling industry. This was followed by a law, effective until February 28, 1948, giving the Secretary of Agriculture power to allocate grain among the various distillers. This short-term bill passed both Houses of Congress unanimously.

Our client, Schenley, was adversely affected.

A bill was introduced to extend the legislation until the end of October. The bill passed the Senate unanimously. We concentrated our efforts in the House Committee. All of the rest of the industry, even those adversely affected, abandoned the effort to kill the bill and sought various compromises as to the amounts and allocations of the grain.

We made a straight fight for free enterprise and no governmental controls. Among other things, we ran three full-page newspaper advertisements attacking the bill. Although we accept no advertising commissions, the copy was written by this organization. The bill was defeated in Committee, 12 to 10. The legislation died.

We have given you the bare outlines of these campaigns, but if the Committee is interested we, of course, will be willing to show you in detail exactly how these campaigns are organized and carried out.

We are attaching hereto the organization chart of Carl Byoir & Associates, Inc.

If selected by the Committee to conduct this campaign, we would expect to charge a fee of $75,000, plus expenses, on an annual basis.

To insure a reasonable chance of attaining the objectives you have in mind, we think you ought to be prepared to make available for expenses somewhere between $200,000 and $250,000 a year, in addition to the budget for paid advertising.

The budget for these expenses, however, is at all times with the control of the client. While we submit budgets based on the proposed activities, the final determination of how much is to be spent and for what is made by the client.

No one can pre-guess such a campaign. Frequently, some activities are decreased or abandoned because they are not securing the anticipated results—others may be increased because they are securing greater results than anticipated.

We appreciate very sincerely this opportunity to present our qualifications to you.

Very truly yours,

Carl Byoir, Chairman
Carl Byoir & Associates, Inc.

Clients of

CARL BYOIR & ASSOCIATES, INC.

American Can Company
The B. F. Goodrich Company
Bendix Aviation Corporation
Chicago and North Western Railway System
Crosley Motors, Incorporated
The Great Atlantic & Pacific Tea Company
Hall Brothers, Inc.
Hughes Tool Company
Libby-Owens-Ford Glass Company
Lumbermens Mutual Casualty Company
Lustron Corporation
Minneapolis-Honeywell Regulator Company
Schenley Industries, Inc.
SKF Industries, Inc.
Tile Council of America
C. V. Whitney Interests

## EXHIBIT P-5.

CARL BYOIR & ASSOCIATES, INC.
New York - Chicago - Washington - Los Angeles

### INTRODUCTION

In presenting the following outline of the objectives, methods, procedures, organization and costs of the program for which you have retained us, a few introductory remarks are essential.

To achieve the results you are seeking, we plan to wage the kind of campaign we have employed successfully a number of times in the past. We see no reason to believe such a campaign will not be successful now.

But at the moment we cannot be too specific as to details or too dogmatic as to conclusions. We have not yet had time to assemble or assimilate all the data needed to assure the campaign an ever-increasing momentum.

### THE OBJECTIVES

The objectives of the campaign are clear. They are: to obtain the passage, first in the legislatures of the states of New York, New Jersey and Ohio, and later in the other states of the Conference, of tax measures which will allocate to the heavy trucking industry its fair share of highway construction and maintenance costs.

Certain intermediate goals are essential to the attainment of the main objective. They are: first, to crystallize the resentment of virtually every motorist over the delays, inconveniences and perils of modern highway travel resulting from commercial heavy truck operation over public roads; second; to arouse the public generally to the need for more equitable and productive methods of financing public highways, and, third, to make the public conscious

of the benefits they themselves will attain from such measures.

The public is only a collective name for countless groups of people, many of whom have bonds of common interest. In terms of our objectives, our subsidiary goals include informing, organizing and activating as many legitimate, strong and politically aggressive groups as already exist or that can be brought into existence for their own self-interest.

The public and its separate parts must be informed by a purposeful barrage of continuing publicity. Our men in the field must organize the individual groups. Together, the publicity given the subject and the actions of the groups must be directed toward the legislators so that they will act in accordance with the demands of the voters.

### Methods

As we see it, the whole program must have a basic appeal so broad that it will enlist the active support not only of the direct friends of the railroads, but, for example, a group of motorists conscious of the shocking hazards prevailing on our now inadequate and damaged highways, or taxpayers' organizations up and down the several states, or a group of tax authorities interested in improving state revenues, or the state grange and all others who can be shown where their own self-interests parallel those of the railroads.

In other words, the railroads are simply identifying themselves with a program in the public interest. They are taking a vital step to bring about the adoption of enlightened national transportation policies which will result in a more equitable and effective national transportation system.

As the largest single transportation agency within that system, the railroads have a legitimate and inescapable interest in the problem. Their investment in their own

facilities is the largest of any form of transportation. Their annual maintenance expenditures are the largest. Through property and other forms of taxes, they pay out in the aggregate an annual sum of money that more than compensates for benefits they receive and even defrays much of the public cost of other forms of transportation.

As trustee for hundreds of thousands of individuals and institutions with billions of dollars invested in railroad transportation, railroad management has a grave fiduciary responsibility. It is the responsibility for maintaining substance and earning power behind those investments. A group of managers who failed to participate in any measures, consistent with the public interest, which are designed to maintain the values behind those investments clearly would be shirking their responsibilities.

The railroads have a special interest in highways as part of the national transportation system. They themselves are users of the highways for short hauls and light truck operation. And no one can doubt that they already are contributing far above any benefits they derive as highway users.

A new national transportation policy is evolving. The railroads have a responsibility for helping to mold that policy in the public interest. The keynote of that policy must be that no part of the transportation system shall enjoy a free ride at the expense of any other; that all must share the financial responsibility in providing for the United States the finest possible transportation system.

In the campaign to follow, every action, from the major statement by the most important witness before a legislative committee on down to the briefest leaflet distributed in Hohokus, must be consistent with that platform.

## Procedure

The pressures of everyday events are setting into motion forces that are already moving in the direction to be

taken by this campaign. Some 37 million motorists are finding their highways choked with commercial traffic. The hazards of the pleasure drive daily become greater. Heavy trucks are beating the pavements into bits. Mounting gasoline taxes are a constant source of annoyance. Motorists return to their homes irritated and ripe for action of some sort. But as yet they have not found a way to make themselves vocal or to express their resentment in legislation. That this campaign is moving with the trend is indicated by the number of motor club officials beginning to agree with some of the measures advocated by the railroads.

The ranking highway official in the nation—Thomas H. MacDonald, Commissioner of Public Roads—consistently holds the heavy truckers responsible for highway damage.

The recent Governors Conference created a body to draw up suggestions for uniform state highway regulations.

In widely separated regions, individual newspapers, feeling the public pulse, are starting reportorial series describing the damage being done to highways by overloaded trucks.

Individual state highway officials are voicing mounting concern over heavy truck damage while state finance bodies are calling for more taxes with which to build bigger and heavier roads.

Even municipalities are becoming aware that these trucks are damaging city streets and paying virtually nothing for the privilege.

It is our task to accelerate these spontaneously generated currents, and harness their force to the drive for remedial tax measures.

For this purpose we need all the allies with whom we can make common cause. We must ally ourselves with certain phases of AAA activity and intensify them. State and local motor groups must be stimulated to exert pressure on their legislative representatives. This will come from the realization that the program we are setting in motion will bring financial relief to the individual motorist.

Property owners, national, state and local real estate boards, local merchants, service and civic clubs, local taxpayer organizations, economy groups, labor and others must learn of the benefits to them of the proper allocation of highway costs and must be helped to take action in their own self-interest.

Liaison with state highway officials must be established wherever possible. We must focus more attention on the conclusions expressed in their conferences. We also must create more conferences, meetings, forums and discussion groups at the local level so as to obtain clear understanding of the highway problem.

The same thing is true of state finance officials. These officials must be made aware of the revenue potential of such expanding and prosperous industries as trucks and pipe lines.

City officials everywhere are under pressure for funds with which to create parking areas, repair and modernize main streets and other thoroughfares. So far the heavy trucking industry has been able to use publicly provided facilities at little or no cost.

Through granges, co-operatives, exchanges and other farm organizations, farmers must be organized to press for revenues from the trucking industry so that rural roads may be improved. Similarly, state, county and city school officials, teacher organizations and local PTA's must be rallied behind a drive which would free general tax funds now diverted to highways for use by the education system for the new buildings so desperately needed by the rapidly expanding primary school population.

The railroads are the nation's largest customer. This means that in every region of every state in which we operate, people can be found who sell goods or services to the railroads. We need your help in identifying these people and in enlisting them in this campaign in their own self-interest.

### Publicity Themes

Publicity themes to be carried in testimony, newspaper stories, magazine articles, radio discussions, television shows, newsreels, speeches, pamphlets, local discussions, reference books, direct mail literature and paid advertising will come under such broad headings as: national transportation needs and studies; highway safety, hazards, damage and adequacy; consumer tax relief, state and city taxation, state and city finance, threats of socialization and as many more as can be found.

### Organization

The major portion of the organization to carry on this campaign already exists in Carl Byoir & Associates. The campaign will be directed from the New York offices by Messrs. Byoir, Swinehart and Hammond. The account executive, Mr. Girdler, with the help of Mr. Schiff, another one of our vice presidents with long experience in legislative problems, will be in direct charge of the work.

Our Washington and Chicago offices will be active in carrying out the program. In the early stages, at least, a great part of the burden of carrying on the drive will fall on our specialized departments. For example, the magazine department has been told to start work on the long process of researching and writing major magazine pieces; the radio department has been alerted to write scripts and create events acceptable to the networks and the hundreds of local stations throughout the Eastern Conference. Our motion and still picture department has been told to collect, originate and distribute pictures illustrating the themes already mentioned. Our women's department must carry the themes to the printed pages of interest to women and create programs on these themes acceptable to women's clubs of all types.

Because of the scope of the campaign, it will be necessary, in addition, to have a relatively large number of people exclusively assigned to this operation.

The staff, as we see it, will consist of an able publicist as assistant account executive to coordinate the publicity efforts of the staff and the departments. Under him will be competent field contact and publicity men in New York, New Jersey and Ohio for the present, and later, in other selected states. These men will be backed up by a mobile group of writers to produce the volume of copy required and to move from point to point as special opportunities arise.

We also are assigning to this account a man with established governmental, legislative and editorial contacts to write speeches, pamphlets, magazine articles and other editoral matter for special purposes and outlets.

## Costs

As to costs, we have endeavored to be completely realistic in our estimates. During July and August—the first weeks of our work—we are not fully staffed. Including all items of expense down to postage, we doubt that our August bill for expenses will much exceed $3,500.

We are submitting an estimate for the month of October as an example of the costs as the campaign gains momentum. With greater activity all along the line, with travel, organization work and contacts under way, the expense budget we expect will rise to around $20,000 per month.

We are also submitting a cost sheet for the month of January when we expect to be operating at a rate which will be sustained through the remainder of the contract year. Our estimate of expenses for the month of January is approximately $30,000.

On this basis, with a rising rate of costs from August to January and a sustained operation thereafter—we would now estimate total expenses for the year at approximately $274,190, plus our annual fee and whatever the Committee at the proper time may appropriate for paid advertising and other activities.

*Exhibit P-5*

ESTIMATE OF CAMPAIGN COST
FOR MONTH—AUG. 1 TO SEPT. 1

| | |
|---|---|
| Salary Account Executive | $1,250 |
| Salary Legislative Director | 417 |
| Salary Secretary (3 weeks) | 159 |
| Salary Staff Man (2 weeks) | 269 |
| Magazine Department (5 days @ $50 per day) | 250 |
| Research Department (5 days @ $30 per day) | 150 |
| Washington Office (5 days @ $55 per day) | 275 |
| Travel | 350 |
| Telephone & Telegraph | 150 |
| Stationery, Mats and Mimeo | 200 |
| Postage | 100 |
| Total expenses for month | $3,570 |
| Fee | 6,250 |

ESTIMATE OF CAMPAIGN COST FOR MONTH OF OCTOBER, 1949

| *Regular Staff* | | *Departments* | | *Other Operational Expenses* | |
|---|---|---|---|---|---|
| Account Executive | $ 1,250 | Magazine (10 days per month) | $ 500 | Organizational expenses, forums, rallies, conferences, etc. | $1,000 |
| Legislative Director | 417 | Radio (20 days per month) | 800 | Travel and Entertainment | 1,000 |
| Assist. Account Executive | 1,000 | Special Events (5 days per month) | 200 | Telephone & Telegraph | 300 |
| Magazine Man | 1,460 | Production (10 days per month) | 330 | Stationery, Mats and Mimeo | 800 |
| Picture Man | 500 | Research (15 days per month) | 450 | Postage | 350 |
| New York Field Man | 834 | Financial (5 days per month) | 230 | Booklets, Pamphlets and Outside Photography | 1,500 |
| New Jersey Field Man | 834 | Motion Picture and Television (5 days per month) | 200 | Clippings | 150 |
| Ohio Field Man | 834 | Photographic (10 days per month) | 300 | Committee Expense | 150 |
| Six Staffers (average $508 a month) | 3,048 | Washington Office (10 days per month) | 550 | Payroll Taxes | 100 |
| Six Steno-Secretaries | 1,200 | Chicago Office (2 days per month) | 90 | Total | $5,350 |
| Total | $11,377 | Total | $3,650 | | |

Total Projected Campaign Cost for October, 1949—$20,377
Fee— 6,250

Exhibit P-5

147b

## Estimate of Campaign Cost for Month of January, 1950

| *Regular Staff* | | *Departments* | | *Other Operational Expenses* | |
|---|---|---|---|---|---|
| Account Executive | $ 1,250 | Magazine | | Organizational expenses, | |
| Legislative Director | 417 | (10 days per month) | $ 500 | forums, rallies, conferences, | |
| Assist. Account Executive | 1,000 | Radio | | etc. | $ 4,000 |
| Magazine Man | 1,460 | (25 days per month) | 1,000 | Travel and Entertainment | 3,000 |
| Picture Man | 500 | Special Events | | Telephone & Telegraph | 750 |
| New York Field Man | 834 | (5 days per month) | 200 | Stationery, Mats and Mimeo | 1,500 |
| New Jersey Field Man | 834 | Production | | Postage | 750 |
| Ohio Field Man | 834 | (20 days per month) | 660 | Booklets, Pamphlets and | |
| Six Staffers (average $508 a | | Research | | Outside Photography | 3,000 |
| month) | 3,048 | (5 days per month) | 150 | Clippings | 300 |
| Six Steno-Secretaries | 1,200 | Financial | | Committee Expense | 200 |
| | | (5 days per month) | 230 | Payroll Taxes * | 300 |
| Total | $11,377 | Motion Picture and Television | | | |
| | | (10 days per month) | 400 | Total | $13,800 |
| | | Photographic | | *January Taxes | approx. $ 300 |
| | | (10 days per month) | 300 | April Taxes | " 1,500 |
| | | Washington Office | | July Taxes | " 400 |
| | | (5 days per month) | 275 | October Taxes | " 300 |
| | | Chicago Office | | | |
| | | (4 days per month) | 180 | | |
| | | Total | $3,895 | | |

Total Projected Campaign Cost for January, 1950—$29,072

Fee— 6,250

RECAPITULATION

| | |
|---|---|
| July 1949 | $ —0— |
| August 1949 | 3,570.00 |
| September 1949 | 11,975.00 |
| October 1949 | 20,377.00 |
| November 1949 | 24,725.00 |
| December 1949 | 24,725.00 |
| January 1950 | 29,072.00 |
| February 1950 | 28,772.00 |
| March 1950 | 28,772.00 |
| April 1950 | 30,272.00 |
| May 1950 | 28,772.00 |
| June 1950 | 28,772.00 |
| To July 15, 1950 | 14,386.00 |
| | $274,190.00 |
| Annual Fee | 75,000.00 |

## EXHIBIT P-21.

Dear Pat:

Here we go down the rocky road to LaPlatta research. I've probably got a lot of stuff you know already because I don't know *all* that you know already, but I hope there's some here that will be new. It's put down by source.

*Hale, AASHO*

A test on trucks vs. roads is definitely going to be run in Idaho. Sponsors are western Assoc. State H'way Officials. Road now being built (bituminous). Should be ready to start in late spring. The truckers will have to cooperate; they don't dare stay out. (Note: others say he may be over-optimistic; it is possible the testers might end up having to buy trucks, but not probable.)

Two other tests are in the talking stage, one to be run by Mississippi Valley Assoc. State Highways Officials, other by Southeastern ASHO. Another possibility is that these two would combine into one big million-dollar one. The Highway Officials are not the only sponsors and bill-payers, of course. All the same groups that joined in on Md-One are expected to again, and the hope is that there'll be some federal money too, if it is decided to try to run a mammoth test.

The truckers sometimes charge that a trouble with the Md. test was the portland cement road, ~~that cracks, etc. wouldn't have~~ as you know, appeared if it had been bituminous. Well, ~~the Idaho test will be bituminous so they'll have their innings there. Meanwhile,~~ Mr. Hale observed, the turn-arounds in Maryland were built of bituminous and they showed worse beating than the highway *and* the cost of maintaining them was very high. He admits this is not conclusive evidence; the turnarounds might not have been too well engineered, the radius might have been to small, but he throws it in for whatever it may be worth.

What the truckers won't get through their heads is that highway engineers have to build roads for a life span of 20 to 25 years, at least; bridges for 50. Once you've built the road for that term, you have to restrain the usage of it for the same term. The truckers want to be able to change every couple years to bigger, wider, heavier, longer, higher or some other truck; no highway engineer in the world can foretell all the improvements they want and even if he could, he couldn't get public opinion—or dough—to build strong enough roads to withstand every "improvement" truck manufacturers may come up with. Many roads now used by truckers were built twenty years ago; for financial and other reasons they couldn't have been built any better then and present truck traffic over them has to be restricted to what they'll take or there won't be any roads there at all.

We have built 20,000 miles of road since close of war; need 231,000.

Now—here is a tricky point that seemed to me interesting. Mr. Hale says there are 8½ million trucks in use today, but only 300,000 of them or, if you want to be generous call it 500,000, are the heavy trucks that cause all the shouting. Explicitly, he said, "Only 200,000 vehicles in use today have a potential axle load of 27,000#". (AAA was surprised; thought that a low figure; maybe it should be checked.) At any rate, his point is this: Those who own or otherwise profit from half a million trucks in the U. S. are trying to force upon the owners or 8 million trucks and of 44 million passenger cars and, to be sure, the general public—the expense of building roads strong enough to maintain the half million minority.

He had no special ideas how to make the half-million pay for their use. Thought Oregon's system of taxing for ton-miles run worked OK.

*From Mr. K. B. Rykken, American Automobile Assn.*
(to be sent you tomorrow)
(Copies marked "A" ^ came from him: I went to AAA because I had a good in there. I don't have the feeling

they are vitally interested in the Md. tests or any others, though I may be wrong here. They're surely smart apples, and they have have been in this fight with two fists without my knowing it. However, as I started to say, my impression is somewhat that they are anti-truck, ~~all right,~~ but not aiming to do much about it.)

I asked Mr. Rykken how the ordinary little truck driver with the traditional wife and kids felt about all this. His opinion is that the drivers who lease their trucks and are therefore more or less their own bosses (and many fall into this category) are in favor of the tests. They don't like overloading because it breaks down their trucks and causes repair bills, which they have to pay. They get paid by mile; not pounds. The lighter the load, the easier it is to drive, particularly in the eastern terrain where we have hills, curves and bad visibility. This goes for the "leased" truck as well as the plain driver who works for a company. In other words, it's his opinion that the drivers, if they could be reached, would be in favor of the Maryland test showing that lighter loads should be used.

Mr. Rykken pointed out that truck owners and trucking companies are not engineers (he is, worked for Minnesota Highway Commission). They're forever howling that the roads, not the trucks, are at fault, but the truth is they don't know anything about building roads so how can they be sure the fault is all the roads? (He did not know the Truckers Association has now hired a highway engineer.)

Rykken has the feeling that the truckers (meaning the Amer. Truckers Association) has, or at least is beginning to, come to the conclusion that they have a bear by the tail—that some of the leaders now realize they're not going to be able to convince the public that trucks are *not* at fault in the deterioration of roads and that, therefore, they are switching their attacks to the U. S. highway system.

In this campaign, truckers have seized on the sufficiency rating formula and are trying to persuade state

legislatures that road construction and renovation be concentrated on the main arteries of a state to bring them up to adequate sufficiency rating. This rating is based on structure, surface and safety of a road and I assume you know all about it. The concentration of road money on main highways would, of course, be great for the truckers who use them, but a little tough on the residents of the state who don't happen to live on or use them and would prefer to have their state's road money more widely distributed.

Another trouble with the trucker's "solution", if you can call it that, is that to bring the highway system up to their idea of adequate sufficiency rating would require expenditure of at least 6 billion dollars a year for 15 years. We are now spending a little less than $3 billion per year on road construction (not counting maintenance).

(Mr. Rykken's point about trucking assoc. concentrating their fire on the roads reminds me that ATA told me they are reprinting Collier's recent editorial "Clear the Roads" or whatever it is as a give-away. It's the editorial about steel rationing.)

Rykken pointed out that ATA does not have rigid control over all its members or member groups. He thinks that only some of the top guys are ready to admit defeat in the battle for heavy weight allowances; down the line many are still fighting it, i.e., working on state legislatures to up or at least not to down maximum weights.

Rykken said, incidentally, that the battle between the truckers and other interests is much less bitter in the west than the east. Roads there were constructed later than the eastern roads so often are better and can hold up under 22,400 axle loads. (Climate and drainage conditions are better for roads in some parts of west too.) This western "sweetness and light" does not indicate, he said, that the truckers have at least *some* validity when they contend the type of construction is at fault in road destruction rather than the type of trucks—but the fact still remains we have

to live with the roads we have in the east here and now, not the ones we wish we had.

Rykken is annoyed at the truckers assertion that the wrong type of trucks were used in Md-One. The idea was to test axle loads, not gross loads, and that is just what was done. The only reason, for example, tractor-trailers were not used is that they would have substantially increased the cost of the turnarounds. When the results wanted could be obtained just as easily and less expensively with the type used, it would have been foolish to use tractor-trailers and anyway, he's convinced, the results would have been the same.

Rykken says truckers contend maintenance was not sufficient, that they should have gone in with bituminous to take care of the pumping as soon as it started. (I haven't run across this argument from the truckers yet but may when I see them again tomorrow so look to the end of the story for more on this, please, if any). Rykken contends that the maintenance was sufficient and better than most roads would get in a similar six-month period. (I asked him and Hale too how the $2,000 maintenance and $28,000 repair bills would compare with ordinary road costs but both said this was too technical for them and could best be answered by the Bureau of Public Roads boys; since you saw them, I assume you've covered it.)

Rykken threw in that the asphalt people are delighted to help truckers on their fight against the LaPlata tests. He said that "The Ghost of John McAdam" which appeared comes to you tomorrow in *Fleet Owner* and of which a copy ~~is attached~~ was written by a public relations man at ATA; he wouldn't tell who, but seemed quite positive. Since the article was presented more or less as an impartial (but authoritative) article in the Fleet Owner, it warn't cricket for an ATA man to write it—if he did—and might be evidence that the asphalt boys and truckers are in cahoots. However; in "Road Building —Taxpayer's Viewpoint", another Fleet Owner article also

being sent
~~enclosed,~~ the truckers say they don't give a damn what roads are built as long as they get to ride 'em, or some-such like that. (I haven't read it; you'd better.) (I've now read it and am still confused; how are you?)

It seemed to be Mr. Rykken's opinion, if it interests you, that asphalt roads are cheaper to build, yes, but that the maintenance cost goes up at a steeper ascending scale than cement. In other words, first year, no problem, fifth year, asphalt higher than cement, tenth year much higher, etc. I would say he probably knows what he's talking about . . . but since I don't know the subject I could be wrong.

*Ludwig (Call me Curly) Caminita*

This is strictly from jerktown. Waste of time, but since it's your time, here goes. "Siddown, I getya cup-caffee, have a cigrette, listen, here's how I work, stirctly on the squre see. I tellya the truth, everything I say you can check see, that's how I do public relations, see. Listen, it's a plant. I think I know who's behind it but I can't say. I'd just like to know who got to those guys. Harman Nichols, known him for years. Haven't gone near him since I got this trucking account, 7 months ago. Some day I'll see him and I'll say Harmon who the hell paid you to write those stories anyway? Geeze, wish those truckers would let me take the wraps off. I'd prove the Maryland road was better after the trucks ran over it than before. I'd moider them. Those truckers won't let me take the wraps off. Best account I've ever had. I love those truckers. They won't let me take the wraps off. I could really prove a few things about that test, see."

The gentleman has the book *Show Biz* on his desk. Perhaps he'd just been reading it. I can't think the Truckers Assn. takes him too seriously. For instance, he didn't even know they had made the movie described below.

*American Trucking Assn.*

I saw Bob Test of ATA twice and the story has two parts. First, my impression is he's a pretty good joe who

wishes he has a different job. On Thursday, I learned the following three things from him but they must not be used for publication without verification for reasons explained further. They are:

(1) The truckers have taken a color movie showing Bob Test driving along the LaPlata road, test part and also couple of miles on either side. There is a glass of orange juice on the dashboard and it does not move more perceptibly on un-test section than on test. This is to prove that the trucks didn't ruin the road. (Yea, I know and they know the shots were taken after $28,000 repairs but that is not part of the picture.) The strip also shows the full stretch of test road after repairs compared with other stretches of old 301. Made much of is the Speed Limit 50 sign at the beginning of the test section. If the road were ruined would the limit still be 50? In my opinion, the test section has multiple marks of repairs that will have to be doctored if the movie is to show what the truckers want it to show. Mr. Test said there were no plans yet how to use it, if any.

(2) Truckers are collecting pictures they are planning to put out in a brochure to show Old 301 Ain't Dead. Pix, as you will guess, show parts of the test section which look better than roads in constant use all around the U. S.

(3) Truckers have hired a highway engineer from Topeka, Kansas, name Wm. Arndt. He went on the job Monday, was down at LaPlata Thursday. You can surmise what they are trying to cook up with him. I meantiond Arndt to Daniel, Scripss Howard, and he was quick to venture that this highway engineer, .. any, must be broken down, discredited, or have holes in the head.

Now, reason you should not publish . . . "Truckers have put out a slick color movie hopped up to show . . . accompanied by brochure . . . hired a phoney . . . etc." None of these things are out yet. Premature pub-

licity would cause the truckers to withdraw and howl lies. They may be withdrawn anyway. First two still in planning stage and as I tell later on, Arndt may be fired or disgugsted by now.

What I suggest is that, if your writer wants to use any of these points, he call at ATA himself near publication time to check. He can call me first and I'll suggest a way to word the questions that I think might work and would also keep me out of it. I may be the only outsider so far who's seen that movie as it had just ceom from the developer. So don't get me in the middle.

Other points I picked up, mostly from Mr. Test:

(1) Truckers contend there is no more damage, and perhaps less, on the road section which adjoins the turnarounds and which took twice as much traffic as other parts. (Draw yourself a picture and you'll see how. Their version is "40 years of traffic on these sections and they weren't damaged it all; it's all in the roads, not the trucks."

(2) The $28,000 repair bill has not been properly itemized as to what was due to deterioration of road because of the test and and what wasn't. It includes replacing slabs taken out to be tested, whether or not they needed replacing. It includes building shoulders where they'd never been before. During the 6-month traffic cracks were patched with blackstrapping instead of properly so they required more expensive repair in the end.

(4) And over and over again, the road is in good condition now and anyone who says it isn't, lies.

(5) The opposition, all thieves (by name, Burea of Roads, AASHO and Highway Rewearch Board) jumped the gun on feeding nawty propaganda to the press in spite of agreement among all not to release anything until all the results and final reports were in.

(6) The tests were not run on a scientific basis. Subsoil was not adequately tested in advance. More tests were

made on it after the test than before and the only reason for this was to do the truckers in.

(7) There is a section of road recently built in Ohio which fell in before even one auto went over it. (Is this to answer Laushe? Don't ask me where the road is; I asked ATA but got only evasive replies.)

(8) My impression is that Truckers and asphalt people have merged in at least a temporary or shotgun wedding. By now, I've heard it dropped too many times that "I personally prefer to drive on a blacktop" to believe it's just personal preference.

As I said, I saw Mr. Test twice. Anything I learned I got the first time, Thursday. I asked then if I could see Mr. Arndt, the new highway expert Friday. He said sure, confirmed this when I called for an appointment Friday morning. (From Scripps Howard) When I arrived at ATA fifteen minutes later, things were so different. Test had evidently conferred with a man named Russell, who Test told me was assistant director of public relations, and Russell wasn't letting me have any of Arndt. Perhaps the guy wouldn't buy their story when he went to LaPlata Thursday and had already resigned. No, that couldn't be, because Test told me Friday morning he had checked with Arndt and he would be glad to see me. But Russell wouldn't let me by. His excuse, I was only a researcher, they couldn't waste time on researchers, if the writer wanted to see him perhaps he could arrange, etc.

I should explain here I don't think Test had a clear idea of where I was from. (Damn sure he didn't.) I'd gotten to him through Caminita and Test never asked any questions. What Caminita told him I dunno. I had told Caminita that I was doing research for a magazine article, that I used to work for Collier's full time and now was a free lance researcher. He could have translated this to Test that I was a Collier's editor (if I'm any judge of Caminita mentality). (By the way, he knows Gerry Dick

and asked about her; now how would that be?) But as I was saying, when Russell got me he said who was I working for and I said collecting info for a writer in NY who might want to do an article on the Md Test for Collier's, SatEve or whoever he could interest. This gave him the excuse he wanted to say no researchers thanks. I wish you'd have OK'd my saying I was collecting for C. Byoir; then I could have let go with a few how do you expect to get a decent press when you won't give and everybody else will?

Despite all this, I would definitely recommend that your writer go to ATA to try for information. First place, it'S an impressive building, tasteful decorations green and copper, just putting air-condition in, sign politely saying "Welcome to ATA, May We Help You", award from American Public Relations Association, 1945, in a show window. Shortly, quite a show.

One final thing from the Truckers, I asked four or five times how they felt about the Idaho tests coming up and still don't know. Such answers as, "We'll hope that if the tests come off they will be allowed to show true results not preconceived ideas of what trucks do to roads." If I were running the test and *if* the truck manufacturers supply trucks I'd sure look them over to see if they'd phonied to axle loads or somesuch.

*Daniel, Scripps Howard*

This is a very nice and fairly young reporter, quite busy so I did not take much of his time. He said:

(1) Atlantic or Harper's preparing story on same subject; someone came to see him.

(2) In answer to your question, truckers haven't tried to "get to him". They won't speak to him. He used a quote he got from one of their legal men; they denied it and the war is on.

(3) Daniel's comment: "Truckers are a mendacious bunch; listen to their story but don't believe anything they say."

(4) It is all an economic problem. Their volume of business doubles every five years and their profits come from overloading and keeping down expenses. They intend to keep it that way long as they can.

(5) The LaPlata road is in terrible shape, even after the repairs. It pumps.

(6) The association has a book called Fighting Facts circulated to truckers, truck dealers, etc. It tells how to carry the word down to the local press and local legislator. There are for example form letters to meet every emergency. The trucking firms are supposed to write, Dear Editor, that story was unfair, not based on facts, etc. . . ." There are also hints about influencing legislation. The "facts" presented in the brochure come from authorities who are phoney lobbyists. Needless to say I hoped there would be a copy of the book at ATA that I could lift, but there wasn't.

(7) Truckers seem to have won Senator Johnson over to their side; Daniel doesn't know how.

(8) You will recall the truckers boast about Maryland legislature refusing to lower the 22,400 axle load limitation to 18,000 after the Md Road Tests. I asked him why. He said the truckers did this by pure lobbying. They moved in when the legislature did, in Annapolis, and not a week went by when they didn't entertain the guys, royally. They brought witnesses: an example is a GI driver who said he'd be ruined if the new legislation went through. The truckers do a lot of work for the legislators; others don't make themselves heard on the road subject. The railroads used the same tactics in the 1890's and got their innings. Now they're discredited; any railroad man appears in a

state capitol and whatever he's for will be voted against. (Nice story, if true, but I doubt it.)

(9) Truckers legislative policy is to get one state to allow 22 thousand pounds, move to the next and say your neighbor does why not you. By this methos all New England allows 22,400 or some such figure. (But you probably know all this and anyway New England roadbeds are better than others.).

(10) Richard Newburger has done some extensive writing on tactics he observed truckers used when he was in the Oregon legislature.

## EXHIBIT P-24

Confidential

Memorandum to: Department Heads

From: Reynolds Girdler

Re: Objectives of Eastern Railroad Account

### FOREWORD

For the past twenty years, or ever since the rise of the airplane, the truck and the automobile as mass transportation agencies, the country has been groping for a new national transportation policy. The old policy—if such it could be called—concerned itself with only one medium—the railroads. The policy was founded on the idea that the railroads had a transportation monopoly, and should be regulated as such.

The facts have long outgrown the theory. The laws and regulations of the land continue to treat the railroads as though they were a monopoly; meanwhile both freight and passenger business moves in increasing volume over the highway and through the air at public expense.

But recently government officials and transportation authorities have become increasingly active in agitating the need for laws and regulations that would grapple with the present rather than with the historic past. Both Roosevelt and Truman have called for a new national transportation policy that would regulate and tax all agencies equally. Congress itself has declared the national policy to be: assignment of that portion of the transportation burden to the agency best fitted for it, with equality of treatment for all. This means airlines for speed, trucks for short-hauls, railroads for long hauls. The Hoover Committee has recommended the creation of a national transportation authority, and, pursuant to that recommendation, committees in

both the House and the Senate are now seeking to develop the engineering and financial data from which to construct a policy that would give the nation the most efficient transportation system.

We have been retained by a special committee of the Eastern Railroad Presidents Conference, an organization of some 35 railroads with business in seventeen eastern states, to develop a public relations program that would give to the public a better understanding of what constitutes a modern transportation policy and what measures should be taken to give the American people the world's finest transportation system. Actually, if some omnipotent engineer could, overnight, impose on the nation the ideal transportation system, the financial problems of the railroads would be at an end. This is true because the railroad remains the most efficient form of transportation. Example: the railroads can haul 100,000 tons of freight from coast to coast at a cost of 3,500 man-days of labor. It takes 90,000 man-days to do the job by truck and 50,000 man-days by plane.

Under the present and outmoded policy, the railroads are prevented by tax laws, regulations and sanctioned practices that have their roots in some long-forgotten special situation, from operating at their true efficiency. They spend almost a billion dollars a year in maintaining their own rights-of-way and equipment. In addition, they pay taxes on these facilities amounting to another one billion dollars annually. The public, through taxes, supplies the airlines with subsidies and terminal facilities and supplies the trucks with highways maintained largely at public expense.

The ideal transportation policy leaves plenty of room for growth by both the airlines and the trucks. Both have an essential position in the transportation picture—the planes for speed, the trucks for short hauls, the rails for long hauls.

## IMMEDIATE OBJECTIVE

Between the two World Wars, federal and state governments, in the absence of a modern, comprehensive national transportation policy, lavished more than $40 billion on a national system of highways. True, these highways were primarily provided for the motorist. But they represented an outright gift to the trucking industry of free roadways over which they could do business at public expense.

But with the outbreak of war, as you all know, the trucking industry practically collapsed as a transportation agency. The railroads carried 97 per cent of all organized troop movements, more than 90 per cent of all military freight and more than two-thirds of all freight of all kinds, civilian and military.

Now the Federal government and the several states are embarking on another costly road building program. In the absence of an overall policy, special governmental departments have blue-printed major development programs which would add to the free facilities of the big trucks—and add to the taxes the motorist will pay, the taxes the wage earner will pay, the taxes the property owner will pay.

Our immediate program, therefore, calls for the widest possible publicizing of what these ambitious highway programs mean to the average citizen. For the present, we will concentrate on the states of New York and New Jersey. This means that the voters of those two states must be made aware, through us, of the physical size and financial burden of the highway situation within those states.

Specifically, we must write all publicity in terms of the self-interest of certain groups. This publicity must be aimed directly at Motor Groups, Real Estate Boards and individual owners, Economy Groups, Service Clubs, Safety Groups, City and County Officials, Rural Road Improvement Groups, and all others *who have something to gain if the burden of financing the highways can be transferred from the individual citizen and the individual motorist to those who alone profit by it—the heavy trucks.*

In this campaign, we are moving with the times. The tide of public action and public opinion is running with us. Already such groups as the AAA, which traditionally has provided the trucking industry with a large crowd in which it could conceal itself, is alarmed at the damage being done to the highways by the heavy trucks, and at the substantial increase in the numbers and sizes of heavy trucks using highways designed primarily for light passenger car travel.

At the last Governors Conference (June, 1949) the problem of truck damage to highways, proper state regulation of trucks, and the even more important problem of where to find the revenue with which to build needed roads, occupied most of the agenda.

In widely separated regions, individual newspapers, feeling the public pulse, are starting reportorial series describing the damage being done to highways by heavy trucks, and calling for appropriate action by state governments.

State highway officials are voicing mounting concern over heavy truck damage while state finance bodies are calling for more taxes with which to build the bigger, heavier and more expensive roads which alone can support the pounding of heavy trucks.

Even municipalities are becoming aware that these trucks are damaging city streets and paying virtually nothing for the privilege.

It is our task to accelerate and broaden these spontaneously generated currents.

## CATEGORIES OF PUBLICITY

The subjects with which our newspaper stories, magazine articles, pictures and radio programs will be concerned are these:

### National Transportation Policy

What it should be; agencies concerned; groups affected; specific roles of competing carriers, etc.

For our purposes, any story, radio program, picture or project on the general subject of national transportation which would dramatize the crowded highways, the damages being inflicted on highways by heavy trucks, and the heavy cost such roads are imposing on the citizen as distinct from the trucker, would be welcome.

HIGHWAY CONSTRUCTION COSTS

Nationally, it has been repeatedly estimated by public roads officials and others that the nation needs to spend $20 billion over the next ten or fifteen years to bring existing roads into proper shape and to add the needed additional mileage. Since these officials are constantly sounding off on this theme, the subject of highway construction costs is a lively one news-wise. Therefore, this category should be an especially productive one for us. Some stories on this subject naturally suggest themselves: Heavy Trucks Add x-Billion To Cost of Modern Highways, Says Road Expert; State's Highway Debt Soars as Road Building Program Starts. In every instance, such stories should be vehicles for these ideas: that highway costs are mounting, that the heavy truck is responsible for most of this added cost, that the cost is being placed on the individual motorist and taxpayer rather than on the heavy trucker, and that heavy trucks should begin to pay their fair share of the burden.

HIGHWAY SAFETY

This is a subject of wide appeal and should give us plenty of scope for the ingenuity that distinguishes good B&A departments. Trucks now account for about 15 per cent of all highway accidents. Their accident-to-mileage ratio is higher than any other class of motor vehicle. Principal truck causes of highway accidents

are: slow progress uphill, thereby piling up lines of impatient motorists; too great speeds downhill in effort to gain momentum for next hill climb; faulty or inadequate brakes; illegal and excessive loading; excessive speeds in effort to maintain schedules. Who do we get to say these things for us? How can we get such people to say them for the press and radio? How can such facts be shown picture-wise?

HIGHWAY DAMAGE

This is also a lively current news subject. During the war, the states voluntarily abandoned their policing of truck weights. (Each state has laws governing the total maximum amount of weight allowed for a truck fully loaded, and governing the per axle load). As a result of the wartime emergency, overloaded trucks ran wild and beat our highways into bits. This is one of the principal causes of the heavy repair expenditures every state is being required to undergo. The habits of lax enforcement have carried over to the present from the war period. As a result, damage to highways is continuing, and is a continuing source of friction between state highway officials and the truckers. Local motorist groups, too, are beginning to complain. We must publicize the physical extent and the financial extent of this damage, and make people realize that the trucks are causing most of the damage. Once again, who can we get to issue these statements? How can we generate pictures and picture-stories of this damage?

STATE REVENUE AND EXPENDITURES

We are already releasing, through a group dedicated to economy in state affairs, stories on the mounting costs of New York State's highway program with appropriate plugs for the role of the heavy truckers, and have a number of other stories carrying the same

theme that we will issue in a steady stream through this group. But this work needs expansion. What other individuals or groups such as transportation experts and motorist groups, can we utilize for alarm over the conditions of our highways and the costs thereof?

GENERAL TAXATION STORIES

Taxpayers Burdened by Highway Costs, Tax Officials Probe New Revenue Sources, Railroads Biggest New York State Taxpayer, State Rail Taxes Exceed Highway Revenues are only four stories we are writing now and will release through a group with which we have made proper arrangements. However, there are other forums. Can we get such topics discussed on the air? What type of individual would you need to assure such a radio discussion? What type of feature or editorial outlets could use general taxation stories?

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You can see from the foregoing that this account is utterly unlike the conventional one. Here we do not have a client for attribution. Of course, we will release some stories under client attribution, but they will be of lesser propaganda importance than those we can generate from motorists, property owners, taxpayer, farmer or women's groups. In sum, we not only have to create publicity ideas; we also have to go out in the field and create the groups and occasions so that those publicity ideas will become realities.

In addition to this memorandum, we can supply each of you with research books which will give you a much better understanding of the material available to you. These books also will give you a much better understanding of the problem. They are big books. They take time to read. We

will willingly give you budgeted time for study of this material, so that you can get ideas for stories, radio and television programs, pictures and projects.

The Magazine Department has already digested much of the material and is deep in the middle of three articles. Research also has done a substantial amount of work. But since we have only one copy of each book, it will be necessary to pass the copies from department to department. Depending on your own schedules, will you phone to let me know when you might have time to start the absorption process?

One more word: if you are asked about the nature of our work for the railroads, you need only say that we are trying to develop a public relations program to speed the adoption of a more modern, enlightened national transportation policy as already defined by Congress and two presidents.

To get started, could each of you:

(1) Study the reports that we have

(2) Give us suggestions for stories to be prepared for media in your field

(3) Outline to us the people or material you will require to do a particular job

(4) Meet with us at a time mutually convenient to discuss how your department can fit into the picture

(5) Do not approach any outlets until you have first discussed the idea to be submitted with us

## EXHIBIT P-29.

### CARL BYOIR & ASSOCIATES, INC.

Eastern Railroad—Transportation Committee

PRIMER FOR THE STAFF

*Our Client*

The Eastern Railroad Presidents Conference is our client. The group is composed of the presidents of most of the railroads east of the Mississippi and north of Virginia. Included in this group of railroads are the giants: Pennsylvania, New York Central, C&O., B&O., NY, NH & H, etc. . . . altogether more than 35 railroads.

The Conference maintains an official address at 230 Park avenue in the office of the president of the Conference, and president of New York Central System, Mr. G. Metzman. The working office, however, is downtown at 143 Liberty Street. It is listed as the office of the Committee on Public Relations of the ERPC.

As you know the railroads of the United States have a strong national organization called the Association of American Railroads, with offices in Washington, D. C., and regional offices in other locations, including New York. Why, then, the ERPC? Simply because regional problems necessitated such an organization in addition to the AAR. The Western Railroads have a similar organization, as do the Southern Railroads. And further down the line, the railroads operating in any one state have usually joined forces in state organizations, such as the Railroads of New York State, to study and lick problems peculiar to the railroads in that state. As an example, the railroads in New Jersey have joined together to fight property taxes imposed on them which are nine times the national per-mile average, and the highest in the nation.

Actually, though we work for the ERPC, we are responsible to a committee whose official title is Eastern Railroad—Transportation Committee. This committee is composed of sub-committees called Counsel, Research, Policy, and Public Relations. The Counsel sub-committee is composed of various legal big-wigs from a number of the railroads, whose function is to determine the legislation needed. The research sub-committee is composed of a variety of railroad officials, including tax agents, freight traffic agents and the AAR's regional director of the office of Competitive Transportation Research, whose job is to gather the facts. The Policy committee is composed of the presidents of a number of the railroads within the ERPC, which makes it, in practice, the actual Eastern Railroad—Transportation Committee. Chairman of the Policy group is Mr. W. J. Tuohy, the President of the C&O Ry. Finally there is the sub-committee on Public Relations, which is the group we report to. It is chaired by Tom Deegan, V-P, Public Relations of the C&O Ry., and has in its membership the public relations directors of a number of railroads, plus Tommy Ross, p.r. counsel for the Pennsylvania Railroad; Mr. J. M. Fitzgerald, the executive director of the working office of the ERPC, and Mr. J. G. Lyne, editor of Railway Age.

*The Job Ahead*

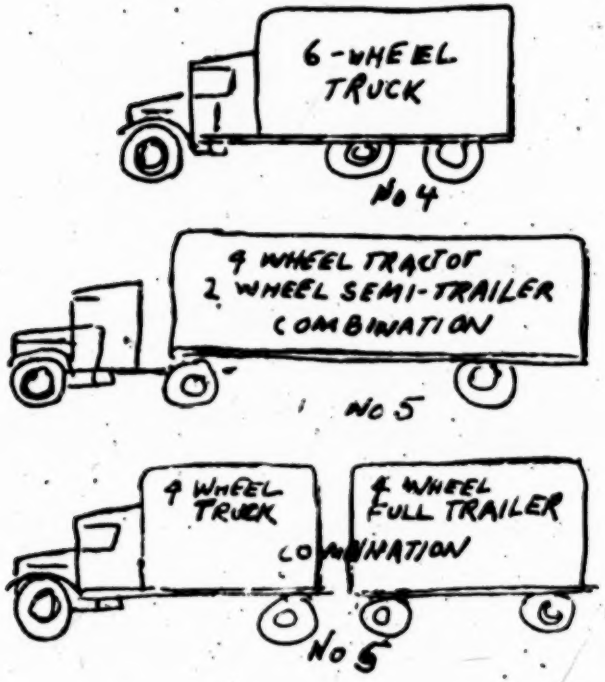
See CB&A's presentation to the ERPC and Reyn Girdler's memo to the staff on objectives.

*About Trucks*

There are all kinds of trucks . . . in size and body type. Your cleaner delivers your clothes in one kind, the dairy uses a different variety, the coal man still another. Farmers have their particular kind, as do delivery and trucking firms. Roughly, truck fall into five classes, thus:

1. Single unit trucks, panel and pick-up, weighing (empty) less than two tons. (92% of the two million farm trucks are 1½ tons or less.)
2. Other single unit, 2-axle, 4-tire trucks, weighing (empty) approximately 2½ tons.
3. Single unit, 2-axle, 6-tire trucks, weighing (empty) 3½ tons.
4. Single unit trucks with 3-axles, weighing (empty) over 6 tons.
5. Combinations, such as truck-trailer (truck permanently attached to trailer), tractor-trailer (power unit, called a "tractor" is separate from trailer), and the tractor-double trailer, etc., weighing (empty) over 9 tons.

Some Kinds of Trucks



Altogether there are more than seven million trucks registered in the United States. But our sole interest is in the giants of the highway . . . the highway boxcars . . . which represent only 4.7% of the trucks registered. These are the trucks in the last two groups (above). We're going to call them the 5 PERCENTERS, to capitalize on the nefarious meaning given that term as a result of the recent Senate investigation.

By what standard do we limit our interest to the top 4.7% of all trucks? Well, essentially, they are the group used by the inter-city and long distance truckers, for they are big enough to gross load to legal highway weight limits, or even overload. Their unloaded weight is 12,000 pounds or over. That's six tons net weight. The average passenger car weighs a bit under two tons.

There are other reasons for sticking to the upperweight 4.7%. They are the ones competing with the railroads. And they are the ones pounding the highways to pieces. Further, as long as we stick to the 5 PERCENTERS we can tear hell out of such fantastic American Trucking Association claims as: "The truckers of the U.S. paid $1,088,000,000 in 'user taxes' in 1948, or more than a third of all taxes paid by highway users, even though only seven of the 43 million motor vehicles registered are trucks." See what they do? To make a good story they lump all trucks together, including the farmers' trucks, the milkman's truck and the light panel pick-ups. But the problem our client has doesn't concern itself with the mikman's vehicle. He isn't competing with the railroads.

We have, so far, talked about unloaded truck weights. But as you go over the material on trucking, you are going to find frequent reference to "axle load." Realistically, each of the two sets of wheels on your two-ton automobile carry their proportion of the load, or one-ton per set (or per axle). If your car runs over you, you will not be subjected to the total two-ton weight all at once, but rather one-ton as the front wheels pass over you, and one ton as

the back wheels go over. Ditto any one portion of a highway. So highway engineers are primarily concerned with axle weight. (Highway bridge engineers, however, are concerned with total weight). Thus you will find that most states base highway weight limits on axle weight. With few exceptions, it is 18,000 pounds . . . a weight limit recommended by the Public Roads Administration (now called the Bureau of Public Roads of the U.S. Dept. of Commerce), the National Association of Highway Officials, the American Road Builders Association, and, lately, the AAA. This limit means that a three-axle truck can have a legal gross weight of 54,000 pounds, or 27 tons. Or a two-axle truck is limited to a gross weight of 36,000 pounds. Most states, as we said, have such a recommended limit. Some, like New York, allow more. (In N.Y., the axle weight limit is 22,400 lbs.) Wisconsin and Virginia allow less. Many, in addition, have a limit based on a formula which takes into account the distance between axles, and most states have an overall maximum gross weight. The Trucking Association continually tries to get these weight limits raised. But lately even the highway engineers, watching the big trucks pound their work to pieces faster than they can maintain it, have fought increases in weight. Most highways now in service were not built to stand even the legal weight limits. And recently built highways have to be built stronger to cope with the heavy weights, which makes them more costly. Yet, despite all this, the early days of an enforcement-of-weight campaign in a state will find approximately 25% of the trucks grossly overloaded beyond the legal limit. Enforcement is lax because it is a job beyond the manpower of most state police forces. So trucks pile on overloads which mean more profits to them and more damage to the highways.

You will also find that trucks are limited in height, width and length. Here again, the Trucking Association tries to get the limits increased.

Another confusing set of terms you'll run across concerns themselves with regulatory descriptions of motor trucks. You'll find reference to "for hire," "common carriers," "contract carriers" and "private carriers." And then you'll find the "exempted for hire carriers." This is what it all means:

FOR HIRE refers to all trucks except "private" trucks, and is the group, in toto, we are interested in. It is a term used to describe "common" and "contract" carriers under regulation or "exempted."

COMMON CARRIERS are trucks operating within one state or across several states which secure franchises of "public convenience and necessity" like the railroads. They must file their rates and operational routes for approval, are sometimes subjected to regulation of hours of service, must carry bonds and insurance, keep specified records, meet certain safety standards and stand ready to take on (*essentially!*) all products of all shippers. If they operate across state lines they are regulated by the federal government's I.C.C. and the regulatory body of their state of registration. If they operate within a state they are regulated by the state regulatory body only.

CONTRACT CARRIERS are trucks which contract to carry cargo for a shipper, whereupon they file their contract rates, and most of the other operational requirements of common carriers, for the approval of the state or federal regulatory groups. However, they do not have to prove to be a "public convenience or necessity." In effect, therefore, they are "franchised" to operate in terms of a particular contracted job, whereas the common carriers are franchised over a period of time, over stated routes. Otherwise, there is little difference between "common" and "contract" carriers.

PRIVATE means just that. An oil company operates its own fleet of oil delivery trucks. A farmer hauls his own

produce to market in his own truck. A dairy hauls its milk in its own trucks. Strictly private hauling and therefore under no regulation, other than the regulation your own passenger car is under.

EXEMPTED FOR-HIRE CARRIERS include both common and contract carriers, which, because of the type cargo they are hauling, or territory they operate in, are exempt from I.C.C. regulation. Broadly these cargoes include any farm produce, rough lumber and fish hauled anywhere. In addition, trucks which haul any cargo between addresses within a single city are exempted. When regulated common or contract trucks have any such cargo, or confine a load to pick-up and delivery within a city, they become automatically exempt from regulation while engaged in such activities. Such a provision, as you can see, leaves big regulation loopholes. Thus the so-called "gypsy" trucker, wanting to haul regulated cargoes at cut rates (such as steel) will cover such a cargo with sacks of potatoes. To the casual inspection of the very few I.C.C. inspectors who might stop him on the highway, he will be carrying potatoes and is exempt from regulation. Regulations governing overloading are not exempted in this category, however.

In addition, the regulated trucking firms are designated by "classes" in the I.C.C., the same as railroads. Class I trucking firms are those who have $100,000 or more in revenues a year. Such class designations are made arbitrarily. Class I railroads are those with annual operating revenues of $1,000,000 or more a year.

(Let it be said here that this effort to brief any category on the subject of trucking has its pitfalls, inasmuch as there is such wide variance of regulation and even meaning. It is difficult to generalize and make a statement "hold water" for any specific state.)

Another baffling trucking term is "reciprocity." What it means is that a truck registered in New York is allowed

to operate across, or terminate and begin its shipments in other states without payment of license or registration fees. Most states have free reciprocity laws, allowing "foreign" trucks to operate in their state without payment of taxes. Iowa, however, is a notable exception. Iowa charges foreign trucks a use of highway fee, by the year, the quarter or the trip. If reciprocity were not allowed, trucks would contribute to the upkeep of the highways of "foreign" states which they pound to pieces, and the added taxes would necessitate an increase in their rates, for the 5 PERCENTERS operate on a profit margin of about 4%.

How are trucks taxed? Generally they pay annual registration or license fees on the basis of unloaded or net weight. In New York trucks and tractors weighing over 1,800 pounds, unladen, pay 80¢ per 100 pounds annually. Trailers over one ton pay $8 per ton for the unladen weight plus carrying capacity. In New York there are no other fees, except, of course, the money collected on gas tax and driver license fees. In some states trucks pay a special motor carrier or "franchise" tax, and other types of fees. In all states the trucking firms pay property and income taxes the same as you do.

The railroads would like to see a ton-mile tax slapped on trucking, since it is recognized as the fairest basis of taxation, for then, the trucker would pay for what he used. But the railroads recognize its impractical nature from an enforcement and collection standpoint. Thus, it pretty well boils down to increasing the registration fees of big trucks. Just what form the legislation will take when the time comes to introduce it in the various states is not known. The Counsel sub-committee of the Eastern Railroad—Transportation Committee is at work on drawing up suggested laws which will be in the public interest.

*About Railroads*

For almost 15 years individual railroads and organizations of railroads (in groupings such as the ERPC, and the

AAR) have been trying without success to secure passage of relief legislation which will assure them some semblance of fair competition.

They have, in their competitive transportation research, accumulated a great wealth of data bearing on the problem, but haven't, for a variety of reasons (many inherent in the data available) broken the information down to a usable or understandable "grass roots" level. Where it has been used, as in AAR advertising or pamphlets, the "poor me" defensive philosophy permeates the copy.

Apart from the statistical data accumulated, their other efforts toward solving the problem have been spasmodic, almost entirely at the management level directed to politicians (trying in vain to shortcut public opinion), and, in many cases, at odds with one another because of competitive rivalry and personalities involved. According to their own estimate, they have even failed in selling the story of railroads vs. trucking to their own employees.

The railroads actually have a very real problem. Trucking is making big inroads into their freight business, which is the staff of life to railroads. As an example: In the past ten years trucks have increased the amount of coal they haul from the mines by 13%. Inter-city trucking has tripled since 1938. And the big trucks have shown a tremendous use-of-highway increase, thus: In 1931 only about eight trucks in every 1,000 had axle loads of 18,000 pounds; in 1947 this increased to 76 per thousand.

Railroads must build and maintain their own right-of-ways (which cost them a billion dollars last year), plus the payment of property and other similar taxes to the tune of another billion dollars. These figures combined (two billion) are approximately what was spent on building and maintaining all streets and highways in the nation last year. Or, if you want to look at it this way: The railroads built and maintained their own right-of-ways, and then paid, in taxes, half of the cost of all the streets and highways. In many areas, the railroads are regarded as the principal

source of tax revenue. In N.Y. state this year, the railroads will pay state and local taxes averaging $3,893 per mile of line. As contrasted with the railroads, motor carriers operate over highways constructed and maintained by public funds.

The result of this inequality of taxation makes it necessary for the railroads to charge higher rates than the trucks. This considering the fact that the railroads are more efficient, thus: The railroads can haul 100,000 tons of freight from coast to coast at a cost of 3,500 man-days of labor, to the truckers' 90,000 man-days. To move the same load (above), the railroads would use 90 tank carloads of diesel fuel, whereas trucks would use 250 tank cars of fuel. And their place in national defense is best attested by the railroads' record in the recent war, when they hauled more than 90% of everything moved (passengers and freight) within the United States.

Higher rates alone are not causing the railroads to lose business to the truckers, and they know it and are making efforts to do something about the problem. But railroads are ageless and cumbersome and all sorts of disagreeable things. It will take time, but they will get there. In recent years, for example, they have begun operating fleets of their own trucks to make door-to-door deliveries. If their taxes were only not so high. . . .

But in these days of higher and higher government costs, any effort to get taxes reduced is doomed to failure. Rather than reduce taxes, legislators are looking for added sources of revenue. Thus the solution to the problem is to educate the public, not on inequalities or high railroad taxes, but on a source of revenue which they have been neglecting . . . the big trucks. And since the cost of highways is a big portion of a state's expenditures, and the trucks are pounding the highways to pieces faster than they can be rebuilt, why look further for a better source of revenue?

*About Highways*

Confusion will reign if you don't get squared away on the types of roads referred to in the various reports. This breakdown will help:

URBAN STREETS (and alleys): Streets located in cities, like New York City, which are built and maintained mainly by funds raised by property taxes (the railroads call them "ad valorum" taxes, which means taxes on both real estate and the improvements thereon), plus money collected by the state in gas taxes, registration and license fees and allocated to the city, as well as (infrequently) the city's own gas tax. In addition, cities make assessments (usually 50% of the frontage cost to the center of the street) against property owners fronting on a newly constructed street, and raise additional money by issuing bonds, in traffic violation fines and from various tolls.

COUNTY AND LOCAL ROADS: Counties and townships build and maintain their own roads from money collected in property taxes, allocations made them by the states from "user taxes," and in other ways similar to the cities, PLUS federal allocations called Federal Aid to Secondary Roads under county control.

STATE MAINTAINED HIGHWAYS: States build and maintain the major highways connecting urban and rural population centers out of money from "user taxes" which they collect (amounting, on a national basis, to 44% of the cost of highways), *plus money allocated from the general fund* of the state. In addition the federal government allocates funds called Federal Aid To State Primary Highways and Federal Aid to State Secondary Roads for the so-called federal highways passing through a state, on the pretense that a cross-country system of highways is necessary for the na-

tional welfare and defense. Most states also issue highway bonds and collect money from tolls, fines, etc.

FEDERAL ROADS: The only true 100% federal roads are located in national parks and similar federal maintained areas.

URBAN EXTENSIONS TO STATE HIGHWAYS: This is a relatively new classification, and came into being to insure a continuation of the major state highways through cities. Usually states have maintained highways right up to the city limits and quit. Cities were supposed to bring them on into the town, or through it, but had difficulty in financing them. To prevent traffic bottlenecks the states, now aided by the federal government, are making specific allocations for this category of roads.

INTER-STATE HIGHWAY SYSTEM describes a newly conceived system of heavy-duty divided-lane highway *superimposed* on the state's *present* primary system to provide not to exceed 40,000 miles of "defense" highways between the nation's urban concentrations of population. Conceived as Federal-aided highways, which a lot of the mileage already was, it is now intimated that the federal appropriation may exceed the matching 50-50 ratio with state funds. Appraisal of the standards for this system of highways indicate their being designed for big trucks' use.

Federal aid, with the exception of the new Inter-State category above, has always been on a 50-50 basis . . . the state or local unit paying half of the cost which is matched by the federal government. Secondary roads, whether state or county maintained, may be Federal-aided so long as the road is not now, or in the foreseeable future, a potential "primary" highway.

Federal aid is continually under severe attack since the total amounts authorized usually represent not more than one of each four dollars collected by the federal government

from excise taxes on motor vehicles. Further, the total appropriations to each state are not on the basis of proportion collected within a state.

The purpose of the above breakdown is essentially one of caution. As you get into road statistics, you might think, for example, that you are talking about the mileage of state-maintained highways (which is our primary concern, since the 5 PERCENTERS operate mainly on them) when the actual figure you've used is Federal-aided state highways . . . a lesser mileage. And so on.

You'll see the term "user taxes" in everything. This refers to the money collected from highway users in *state* gas taxes, *state* registration fees, and *state* motor carrier fees. Federal aid to highways is not usually considered as coming from "user taxes," the reason being that it is not allocated to the states on the basis of percentage raised from a state, but rather on the basis of a formula of miles of roads, population and square miles in a state. (Federal aid, however, does come from highway users in the form of a 1.5¢ federal tax on each gallon of gas, 1¢ tax on each quart of oil and from excise taxes on vehicles and parts.) Since a portion of state collected "user taxes" is allocated to county and local roads and city streets, when you are talking about user tax income for state-maintained highways, you must be cautious to get your figures from the Public Roads Administration table marked "Revenue applicable to state-maintained highways."

You'll also find frequent references to the term "diversion" of highway funds. The American Trucking Association can, and does, juggle the various legitimate figures to show that "user taxes" are much more than the expenditure on highways, and so claim that money produced from highway users is "diverted" to other uses. This is not so, but they have made such a case for it that 20 states have passed constitutional amendments against "diversion" of highway user funds. Actually what happens in the rest of the states is that the income from user taxes is put into the

states' general fund, from which all state expenses are appropriated. As we said above, on a national average, highway user taxes pay only 44% of the costs of the nation's roads. The reason we are against such anti-diversion nonsense is that it has never been possible, and probably never will be, to raise the cost of roads from user taxes alone, if you stick to unjuggled facts. And finally, anti-diversion is a basic fallacy. Followed through to its logical conclusion, you would use the income from the cigarette tax for cigarette smokers entirely, the income from the tax on liquor for drinkers, etc. What then would be available for supporting the schools, the libraries . . . and, yes, the roads?

You will find as you get into the study of our highways that they are in bad shape. Thirty-four states, reporting to the Joint Committee on Economic Report of Congress, estimated (on September 6, 1949) that 20 billion dollars would be necessary to bring their highways up to snuff. Compare this to the period 1921-40, when most highways were being built, in which the total expenditure for all highways, roads and streets in the U.S. was 41 billion dollars.

What has caused this breakdown of the highways? Age, lack of repairs during the war, increased use of existing highways and trucks. Fortunately for our job, trucks warrant and are getting a huge share of the blame. Just how do they fit into the picture?

Over the years trucks have been allowed to get longer and wider. That necessitates wider highway slabs, and, in order to make passing safer, less curves, wider shoulders, etc. Heavier loads have slowed trucks down on an uphill climb. As a result, highway engineers are reducing grades, for studies have shown that in hilly terrain, trucks will reduce the total volume of traffic over a road by 50%. But the greatest problem with the 5 PERCENTERS is their pounding the highway to pieces. The process is called "pumping."

Pumping is easily understood. Watch a small boy leap onto a board set on mud. A bit of the mud will gurgle out the sides. Now watch a heavy boy leap onto the same board. Mud will spurt out from under the board, leaving a void under it. Trucks produce the heavy boy effect on each slab of highway. When the void under the concrete develops, the heavyweights begin to crack off the ends of each slab, and the highway is shot. Fortunately, pumping was unknown before the days of big trucks. Thus, it is damage directly traceable to trucks.

In the broad sense, we are dealing with a problem loaded with political significance. It amounts to this: America will continue to have, use and see operated, its railroads. The question is whether they will function as private business or as a ward of the government. America still believes in free enterprise, and the majority of people today oppose socialism. Delivery of the railroads into government management would be a great, if not the greatest, victory for the advocates of socialized economy in America. Unless the railroads find that their inequitable competitive position with long-haul trucking has been rectified, they cannot exist as a private business which will attract the investor's dollar. In this fight, we have friends in the great majority of the American public and its press. Also, of significance here is the fact that the railroads are being treated unfairly, since by using public-maintained rights of way, the truckers are getting a "free ride" while the railroads are buying a mighty expensive ticket. And the American, fortunately, still is a fellow who votes for fair play.

In summary . . . our highways are in bad shape. The cost of rebuilding them to take care of increased usage is beyond the level of present revenues, and since trucks are the culprits and are not paying nearly their fair share of user costs, the burden is theirs! Amen.

*Material Available for Study of the Problem*

The ERPC has issued two of a total of four volumes designed to corral the most important information bearing

on the problem. These blue plastic-bound volumes are required reading.

Next, brief the small book titled "Automotive Transportation" issued this year by the Brookings Institution. This book considers briefly all of the significant contributions entering into the provision of highway transportation.

Another grouping of material specifically related to the problem are the weekly bulletins issued by the AAR Competitive Transportation Research office. For the most part, these bulletins contain culled newspaper stories and editorials week by week. We have all of them for the past year.

Because it is "lighter" reading, it would be well to pursue the report titled "Highways of Indiana," a report made in 1948 by the Indiana State Highway Commission on their entire highway problem.

Then read Mr. F. N. Nye's memo to Mr. C. R. Dugan, dated New York, July 5, 1949. Mr. Nye is freight traffic manager of the New York Central railroad, and on the Research sub-committee of the Eastern Railroad. His memo is the best summary of the Griffenhagen report on the highway program in Illinois yet made. It will prove an easy introduction to the analytical. . . .

"Griffenhagen Study" titled "A Highway Improvement Program for Illinois." This is the most complete study made to date of any state highway problem, and is important to us because a similar study will be made by Griffenhagen in New York State. .

Although a red light is up on its use, you had better pursue the AAR's mimeographed 14-page study entitled "Do Big Trucks Pay Their Way?" by Dr. Duncan and Earl Feldman. The effort was a factual analysis of the titled problem, but the report got into trouble because it tried to show the amount the 5 PERCENTERS failed to pay on the basis of highway expenditures and on the basis of payments made. The two divergent answers left the report wide open to a Trucking Association attack.

Another booklet, titled "Truck Facts," published by the Automobile Manufacturers Association, is good from the standpoint of noting how the trucking industry has grown.

Then look over any one of the yearly Public Roads Administration booklets titled "Highway Statistics for (year)." These consist of statistics gathered by the PRA from each of the states each year, and show registration, finances and mileage on the nation's roads. They will be our greatest single source of statistical material on a state or national level.

We also have a full set of the speeches made by the U.S. Commissioner of Public Roads which you ought to brief.

Another "heavy reading" report worth briefing is the gray and red booklet published by the AAR on competitive transportation. In this you get the railroad point-of-view, although it is a bit outdated. Ask for "Highway Motor Transportation," August, 1945.

Finally, go through the "clips" we have collected to date. They are filed by subject matter, such as overloading, highway construction, etc.

* * * *

WHAT EVERY RAILROAD MAN SHOULD KNOW ABOUT TRUCK COMPETITION—from editorial in *Railway Age*—Sept. 10, 1949

The railroads are now showing, not any too soon, more concern about their problem of truck competition—and are giving more systematic study to it—than at any time heretofore. The timeliness of this attention is indicated by the Interstate Commerce Commission figures which show that the Class I intercity contract and common carriers alone had gross revenues of more than $1.6 billion in 1948, compared to only $475 million in 1940. The totals do not include the large traffic moved by private carriers by highway, and that of the smaller for-hire trucking concerns. They reveal, nevertheless, for what is only the larger part

and not all of the long-haul trucking business, a revenue volume which was only 13 per cent of railroad freight revenues in 1940 and in 1948 has grown to 20 per cent.

Furthermore, the trucking business has become increasingly profitable. The operating ratio of the Class I intercity for-hire trucks was 95.6 in 1940 and had dropped to 93.2 in 1948. Some railroad men have been deceived by the relatively high operating ratio of the truck lines, compared to that of the railroads. Optimism on this score vanishes when it is recalled that the operating expenses of the truck lines include all the capital charges for roadway—an expense which still confronts the railroads after their operating ratio has been computed.

There is, then, no doubt whatever that a large volume of long-haul freight traffic which used to move by rail has been diverted to the highway, and that the ratio of tonnage so diverted to that remaining on the rails is continuing to increase. The situation, as long as it remains uncorrected, menaces the future of every man connected with the railroad business, directly or indirectly. When any business is confronted by rivalry of such magnitude, the sensible course is to determine to what degree the diversion is based on sound economics—and, therefore, must be accepted as unalterable—and to what degree non-economic factors, which can and should be resisted, may be the principal cause. Very little research is needed to bring to light a multitude of non-economic and even anti-economic factors which are the principal cause of the loss of long-haul traffic by the railroads to the intercity trucks. For lack of space only a few of these anti-economic (and, hence, potentially alterable) factors can be enumerated here—but important among them are the following:

1. To have paid, according to its relative ton-mileage, its fair ratio of highway expenditures, the average "big truck" of three axles, or truck-trailer combination, should have contributed fuel and license fees in 1947 totaling $1,881. The actual average levy was only $538, indicating

a contribution by other highway users and general taxpayers of an average of $1,343 toward the expense of operating these outsized vehicles—the only ones, incidentally, which are a factor of any significance in diverting freight traffic away from the railroads.

2. The foregoing computation of the subsidy enjoyed by the big truck assumes that its share of total highway costs is directly proportional to its ton-mile usage of the highways. Actually, a highway designed to take care of all classes of traffic except the very big truck can be built for a great deal less money than one which must also accommodate these out-sized vehicles. In one state where ton-miles operated by the heaviest vehicles is 45 per cent of total ton-miles, a correct assignment of costs attributes, not 45 per cent, but 55 per cent of the total highway cost to the heavy vehicles. Other studies, as conditions vary from state to state, would assign an even higher ratio of total costs to the heaviest vehicles—which, incidentally, represent only about five per cent of total registrations. It is evident that the estimate, given in the foregoing paragraph, of $1,343 as the average subsidy enjoyed by the big truck is at least several hundred dollars too low, furthermore, this estimate applies only to vehicles within the legal limitations on sizes and weights.

3. As heavily subsidized as even the legally loaded heavy trucks are shown in the above to be, the evidence is that a large percentage of their owners are not content with this generosity—and are increasing their exactions from other highway users and the general taxpayers by loading their vehicles substantially in excess of the prescribed maxima. For instance, the chairman of the Indiana State Highway Commission reported in July that when, earlier this year, enforcement of that state's maximum weight laws was intensified, from 20 to 35 per cent of the trucks weighed were found to be overloaded. The damage by trucks to highways carrying loads far in excess of those they were designed to bear, of course, adds immeasurably

to the subsidy enjoyed by the big-truck haulers, as set forth in the two foregoing paragraphs. One single trip by an overloaded truck in Pennsylvania was reported to have resulted in highway damage totaling $15,000. The fines for overloading, in most states, are only a small percentage of the extra profit which an operator will make by violating the law.

4. Thomas H. MacDonald, head of the United States Public Roads Administration—and no enemy of the trucking business, as readers of this paper are well aware—asserted in a public address earlier this year: 'Axle loads in excess of 18,000 lb. should not be authorized. . . . In some quarters it has been suggested that there be a gradual raising of axle load limits over a period of years. No policy could be more wasteful of public funds.' A tabulation of weight limitations in the 48 states as of the second quarter of 1948 shows that, already, nine states had established a heavier legal maximum than that recommended by Mr. MacDonald. Subsequent to this compilation, other states (e.g., Ohio) have further increased allowable weight and size limitations.

5. The actual fees paid for highway use by the biggest trucks range from $67 to upwards of $700, clearly indicating that no systematic or scientific plan is being followed in levying these charges. Also, there has been no proportionate increase in these charges to reflect the increase over prewar which has occurred in the cost of highway construction and maintenance. The system of "reciprocity"—whereby many states assess no taxes whatever on out-of-state trucks which use their highways—simply invites the truck operator to take out his license in the state with the lowest fee, and to enjoy a "free ride" at the expense of the highway users and other taxpayers in all the other states his vehicles traverse.

6. All railroad service is fully regulated, and the railroads are required to handle all traffic offered at prescribed

rates. There is no regulation—as to rates or certificates of convenience and necessity—of trucks making long hauls of agricultural products (e.g., citrus fruits and milk). Contract carriers, as a matter of legal right, handle only such traffic as they choose—and the railroads are prevented from making rates to meet such competition where it exists unless they make similar rates on other traffic where prospective earnings are not sufficiently attractive to invite competition. Since so-called "common carrier" trucks have limited facilities, they often find it impossible to provide transportation for unattractive freight—so the railroads are left with all the business that nobody else wants. The loss by the railroads of traffic which they can handle with actually greater economy than the trucks—but which is diverted to the highway by subsidies and inequality of regulation—places a burden of arbitrarily higher costs on that traffic which must move by rail.

The above list, of political factors causing the diversion of traffic from the railroads to the trucks, as indicated at the outset, is far from complete. No item in the list is economic. Every one is arbitrarily political, indicating that the operators of outsized, long-haul trucks have been, so far, a lot more energetic and skillful in advancing their interests than railroad men have been in defending theirs. There is no inherent reason why this disparity of political strength should continue, because the solution to these issues which would adequately protect the interest of the railroads also coincides with the self-interest of 95 per cent of the users of the highways and of all payers of general taxes. The railroads' interest also coincides with the overriding national interest in policies toward transportation which will maximize national wealth and income by channeling its transportation to the most economical agencies, not wasting the nation's substance by erecting the senseless political barriers which now exist against the selection of the best agency for the job. Who is going to tell, and sell, the sane approach to this problem to the American people if railroad men do not do it?

**EXHIBIT P-144.**

May 17, 1949.

W. A. R.

For your information attached is copy of memo from J. R. D. and joint reply regarding competitive forms of transportation.

R. J. L.

May 16, 1949.

J. R. D.

Yours May 11th re "campaign for Federal and State taxation against users of highways, waterways, etc." to be discussed in New York May 19th.

*Recommendations:*

(1) The Associated Railroads of New York and the Associated Railroads of Pennsylvania be requested to explore the possibilities of organizing the private motorist and other groups that are injured by larger and heavier over-the-road trucks. The railroads can start but it must become a non-railroad group just as the Shippers Advisory Boards became self-supporting bodies.

(2) It is not necessary to superimpose any new regional organization. Strengthen existing organizations as may be necessary to produce more effective work.

Nearly all inland waterways, coastal waterways and all airways are under Federal jurisdiction. Any programs that reduce subsidy on these forms of transportation should be handled through the A.A.R. This does not prevent state associations from taking action on the state and local level where possible.

The idea that there should be "superimposed a regional organization looking after publicity, etc., and coordinating activities within the several states" may have come from Mr. R. E. Dougherty who recently retired but continues as a consultant for the New York Central.

Mr. Dougherty has done good work in bringing the railroads and the Public Roads Administration together on grade crossing programs. MacDonald wants to bring the railroads, the Public Roads Administration and the State Highway Officials together on size and weights. MacDonald wants to see the railroads get behind the size and weight restrictions recommended by the American Association of State Highway Officials and has urged Dougherty to promote this idea.

Dougherty believes it might stop the annual legislative battles over size and weight restrictions. In our opinion, it will not.

Under such a plan the railroads could not have opposed the increase in Pennsylvania from 45,000 to 60,000 lbs. as this is below the AASHO recommendations.

Adopting the AASHO limits would mean a reduction of some limits in the following states (details attached)—N.Y., Pa., Md., Ind., Ill., Mich., Conn., R.I., Mass., N.H., Me.

On the other hand adopting the AASHO limits would mean increase of some limits in the following states (details attached)—N.J., Pa., Del., Va., Ill., Conn., R.I., Mass., Vt., N.H., Me.

SHOULD THERE BE A REGIONAL COMMITTEE TO LOOK AFTER PUBLICITY?

Publicity programs related to a particular legislative controversy must be handled by the railroads in that state. If it is desired to have a broad publicity program on the general truck, waterway and airway situation it can be handled through the eastern railroads in the same manner as the "featherbedding" campaigns were handled.

SHOULD THERE BE A REGIONAL COMMITTEE TO COORDINATE ACTIVITIES BETWEEN STATES?

As long as the states do not have uniform highway conditions there cannot be uniform size and weight restrictions.

(*) Head of Public Roads Administration (U.S.A.)

Therefore, a coordinating committee is not necessary to handle size and weights.

SHOULD THERE BE A REGIONAL COMMITTEE TO COORDINATE PROGRAMS RELATING TO TAXES (SUBSIDY)?

Subsidy studies by impartial groups (for example—the Princeton Surveys headed by Dr. Sly, in New Jersey and the Pennsylvania Economy League in Pennsylvania) are always helpful. Such studies should be coordinated by the Department of Competitive Research of the A.A.R. If extensive studies are to be made the Department may have to increase its personnel.

Regardless of the number of studies or Committees, the final test is (a) Who can get the clear facts across to the governors and members of the legislatures? (b) Who can get the votes?

These two items can be handled only by the people who are constantly working with the lawmakers.

It is encouraging to find MacDonald on our side in some of these truck controversies. He helped defeat the increase in gross weight in Maryland from 67,000 to 90,000 lbs. and has opposed the increase in axle load now pending in Delaware Legisiature. He has recently made public statements that where the size and weight limitations exceed those recommended by AASHO, they should be reduced. However, the railroads should not indorse the AASHO limits throughout the eastern states. These limits are too high. We have no assurance that the AASHO will not again increase their limits as they have twice, during the past 15 years.

J. M. S.
F. C.
R. C. M.
J. D.

cc: W. S. F.

If the recommendations of the AASHO are adopted following reductions should be made:

| State | Reduce: | Comments |
|---|---|---|
| New York | Axle load from 22,400 to 18,000 lbs. Height from 13′ to 12′ 6″ | |
| Pennsylvania | Axle load from 20,000 to 18,000 lbs. | |
| Maryland | Axle load from 22,400 to 18,000 lbs. Establish 12′ 6″ height | No restriction at present |
| Indiana | Axle load from 22,400 to 18,000 lbs. | '49 law allows 22,400 on heavy-duty highways as specified by Highway Dept. |
| Illinois | Establish 12′ 6″ height | No restriction at present |
| Michigan | Width from 102″ to 96″ Maximum gross weight from 128,000 to 72,000 | While present law permits 128,000 because of length limit of 50′ only haulers of heavy material, steel, lumber, leather, etc. can get above 72,000. |
| Connecticut | Axle load from 22,400 to 18,000 lbs. Width from 102″ to 96″ | |
| Rhode Island | Axle load from 22,400 to 18,000 lbs. Width from 102″ to 96″ | |

| State | Reduce: | Comments |
|---|---|---|
| Massachusetts | Axle load from 22,400 to 18,000 lbs. Establish height of 12′ 6″ | No restriction at present |
| New Hampshire | Establish height of 12′ 6″ | No restriction at present |
| Maine | Axle load from 22,000 to 18,000 lbs. | |

If recommended limits of AASHO are adopted present limits to be increased as follows (not complete—only more important increases are shown)

| State | Increase: |
|---|---|
| New Jersey | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 50 to 60′<br>Maximum gross weight 60,000 to 72,000 lbs. |
| Pennsylvania | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 50 to 60′<br>Maximum gross weight tractor semi-trailer 45,000 to 65,000.<br>Gross weight other combinations 62,000 to 72,000 lbs. |
| Delaware | Gross weight—tractor semi-trailer 60,000 to 65,000 lbs.<br>Other combinations—60,000 to 72,000 lbs. |
| Virginia | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′.<br>Gross weight—tractor semi-trailer 40,000 to 65,000 lbs.<br>Other combinations—50,000 to 72,000 lbs. |

| State | Increase: |
|---|---|
| Illinois | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′ |
| Connecticut | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′<br>Gross weight—tractor semi-trailer 50,000 to 65,000 lbs.<br>Other combinations—50,000 to 72,000 lbs. |
| Rhode Island | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′<br>Gross weight—tractor semi-trailer 50,000 to 65,000 lbs. |
| Massachusetts | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′<br>Gross weight—tractor semi-trailer 50,000 to 65,000 lbs.<br>Other combinations—50,000 to 72,000 lbs. |
| Vermont | Length—other combinations 50 to 60′<br>Gross weight—tractor semi-trailer 50,000 to 65,000 lbs.<br>Other combinations—50,000 to 72,000 lbs. |
| New Hampshire | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′<br>Gross weight—tractor semi-trailer 47,500 to 65,000 lbs.<br>Other combinations—47,500 to 72,000 |
| Maine | Length—tractor semi-trailer 45 to 50′<br>Length—other combinations 45 to 60′<br>Gross weight—tractor semi-trailer 50,000 to 65,000 lbs.<br>Other combinations—50,000 to 72,000 lbs. |

*Limits Proposed by A.A.S.H.O.*

| | |
|---|---|
| WIDTH: | 96" |
| HEIGHT: | 12' 6" |
| LENGTH: | Single truck—35'<br>Single bus—40'<br>Tractor semi-trailer—50'<br>Other combinations—60' |
| GROSS WEIGHT: | Single axle—18,000 lbs.<br>2 axle truck—36,000 lbs.<br>tractor semi-trailer, 3 axles—54,000 lbs.<br>tractor semi-trailer 4 or more axles—65,000 lbs.<br>Other combinations—72,000 lbs. |

**EXHIBIT P-198.**

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New York Washington Chicago

SELVAGE & LEE

*Industrial Public Relations*
1 East 43rd Street, New York 17, N. Y.

July 8, 1949

Jul 11 1949

Mr. Thomas J. Deegan, Jr.
Vice President—Public Relations
The Chesapeake and Ohio Railway Co.
Terminal Tower
Cleveland 1, Ohio

Dear Tom:

I am enclosing the memorandum which you requested. I hope it does the job for your Committee—for us. Cynical me, if is the first thing I have seen since I quit playing around in politics that has me excited.

Cordially yours,

Jim
James P. Selvage

/imp
–enc

New York Washington Chicago

SELVAGE & LEE
*Industrial Public Relations*
1 East 43rd Street, New York 17, N. Y.

July 6, 1949

MEMORANDUM

To: Mr. Thomas J. Deegan, Jr.

From: James P. Selvage

As we told you in our brief discussion last week, we feel—and hope your Committee will agree—that Selvage & Lee has certain special qualifications and background which fit it to serve your group exceptionally well.

In this memorandum, we should like to outline some of these qualifications, for it goes without saying that the selection of the right public relations firm is primary to the results you seek. Also, as you requested, we are incorporating a few observations as to how we would approach the problem.

*Selvage & Lee Qualifications*

First, let us enumerate some of the reasons why we feel particularly well-equipped to work for you and, as you read these comments, we hope you will appreciate that we do not look upon this project as "just another account."

1. *Knowledge of* and *interest in* the problem.

In this respect, our organization is already keenly aware of the problem and has given thought to possible approaches and solutions. More than two months ago we prepared a plan for our client, the American Railway Car Institute, looking to bringing the railway supply industry into the fight to preserve the financial integrity of the railroads and, thus, stave off the dangers of government ownership precipitated by insolvency.

In recent months we have participated in numerous conferences on the subject with Messrs. Fairman Dick and Arthur Page, authors of the recent survey of the railroad situation; with Mr. Faricy and several railroad presidents; at luncheon with the top editorial board of *Fortune*.

For a month or more we have had a researcher assembling facts on the subject, including what has been done in the past by the railroads and the competition, and have had staff meetings directed purely to this subject.

These operations were aimed at the development of ways and means through which ARCI might help the railroads. As a result, without pretending to know all of the answers, we have developed a familiarity with the fundamental issues—with the personalities involved—with the outside citizen groups that might be activated in support of your objectives.

Perhaps equally important with the knowledge and background acquired, the principals in Selvage & Lee have long been "crusaders" for competitive enterprise and have devoted a great amount of time, extra-curricularly, to the propagation of principles in which we believe. The basis of our recommendations to ARCI was that, over and beyond commercial interests, the railroads must be supported as a first line of defense against nationalization of industry.

2. We understand that you envision your program aimed at heavy trucks as being dramatic and hard-hitting, as indeed it must be if it is to succeed. Selvage & Lee, we believe, is one of the few public relations firms that combines:

   a) The ability, based upon experience, to counsel wisely on public relations and to weigh all eventualities before an action is taken, but—

   b) In addition to being sound in planning and strategy, we have the experience in organizing

and carrying through large campaigns requiring the mobilizing of public sentiment.

Putting it another way, we know how to put on a hard-hitting campaign and have done so many times (as for instance, in the case of the current margarine legislative fight); but have never in more than ten years of operation done *anything that has back-fired on a client.*

3. This firm has a record of success in applying public relations techniques to problems which are essentially legislative. Again, we turn to the margarine program. The margarine industry had made a number of abortive fights against discriminatory legislation enacted 63 years ago by Congress and bulwarked by State legislation.

It was our recommendation that the time was ripe to strike in the 80th Congress, with butter selling at $1.00 a pound.

In seven months after we took the account, the legislation, backed by tremendous public pressure, was through the House and was stopped in the Senate only by adjournment for the political conventions. In the meantime, *five states* repealed their legislation over the bitter protest of the butter industry.

The butter opposition, caught short in 1948, stepped up its activities this year. But once again our legislation, supported by organized consumer groups and the press generally, is through the House by a 3 to 1 vote, is at the top of the docket in the Senate and virtually assured of passage at this session or the final session of the 81st Congress.

Favorable action has been taken in 9 STATES this year.

Concurrent with attaining the legislative objectives, margarine has been touted editorially by 90 per cent of the daily newspapers and practically all mass-circulation magazines as the equivalent of butter. *Tide* de-

scribed it as "the greatest publicity campaign of all times."

Other programs designed to promote legislation, or to forestall legislative action of a harmful nature, have been conducted for The Investment Bankers Association, and the American Forest Products Industries, Inc.

4. Ability to work with committees representing an industry is important. Selvage & Lee, as a firm and as individuals, has had broad experience *cooperating* with industry groups. In addition to those already mentioned, we have executed programs for the anti-friction bearings manufacturers and railway car builders.

5. You mentioned that your proposed campaign may eventually encompass advertising.

In this connection, our firm has an additional qualification which should be brought to your attention. We operate a wholly-owned affiliated advertising agency, French & Preston. This is mentioned here because it has been our experience—and that was the reason underlying the formation of the agency—that public relations advertising demands a technique different from product advertising. As you are well aware, public relations advertising quite generally is written by the public relations division because it has developed the policy and research leading up to the ads.

It would be a distinct advantage to have both operations under one roof for then the people who would prepare the ads would be thoroughly indoctrinated with your story and there would not be the necessity of "educating" two separate groups.

There is another factor to be considered, namely that our public relations fee could probably be scaled down if advertising revenue were involved.

We should like to add that French & Preston is a fully-equipped advertising agency, handling this year billings which will approach $1,000,000.

Public relations-wise, it is a definite asset to Selvage & Lee's clients, for it permits better treatment of any programs involving printed matter or art work.

6. We are sure that you feel, as we do, that the way in which a public relations agency is set up—its modus operandi—is important to your considerations.

In this connection, we want to emphasize that Selvage & Lee does not operate on an "account executive" basis in which one of the agency's executive assumes full responsibility for the client or clients assigned to him. Instead, we use the varied talents of all of our basic staff members on the problems of each client.

We feel that it is important to have skilled and proven manpower immediately available within the organization which you select. Thus we call to your attention that in terms of the number of people directly on our payroll—as contrasted with client's employees who might work out of our office or be supervised by us—the Selvage & Lee organization is among the largest in the field.

We have the trained man-power, already indoctrinated with your story, around which additional personnel needed for your program can be built.

We believe firmly in two things: *specialization* and *teamwork*. Thus, Selvage & Lee has—

*A Women's Department*—which not only has a wide variety of national contacts with women editors and writers, but also has specialized in cooperative efforts with women's groups and organizations.

In the margarine campaign, for example, we were able to enlist the interest and active

support of a great many state and local organizations, as well as practically every important national woman's organization.

*A Radio Department* headed by a man who not only knows what makes good radio publicity but has spent years developing contacts in the field.

*A Placement Department*—which undertakes placement of stories and articles written by staff writers. In this department are men who specialize in contacts with national magazines, with press associations, with syndicates, with photo services, with newsreels—and who through the years have built up contacts in almost all important news centers.

This department also has built up working arrangements through the years with some of the country's leading free lance writers and cooperates actively in researching and providing material for them.

*A Labor Specialist*— a man who has wide experience with labor on the labor side of the fence. In the margarine fight he was able to get active and public co-

operation from the A.F. of L., the C.I.O., the Machinists, the United Mine Workers and other unions as well as publicity in scores of union publications.

*A Stockholder Relations Specialist*— whose job it is to keep abreast of the most recent developments in stockholder relations so that those which are sound may be adopted by Selvage & Lee clients.

*An Employee Information Specialist*— who serves the same purpose as the above in connection with employee information programs.

*A Staff of Writers*— all of whom are trained newspaper men and some of whom have served as newspaper or magazine editors.

The results of this type of operation, we believe, speak for themselves.

*Offices.*

The firm has offices in New York, Washington and Chicago, providing outlets in the three major centers from which news most frequently originates and also a flexibility whereby it is possible to undertake concentrated work in a variety of states without getting too far away geographically from home base.

7. We do not take competing accounts—or even accounts whose interests might remotely be in conflict. The fact that we have worked for ARCI for three years not only puts us in sympathy with what you are trying to accomplish but also means that we have steered clear of

any client relationships which might prove embarrassing to you or cause us to give less than our best to your program.

*Approach to Your Problem*

We feel that your gradual approach to the problem, as outlined briefly to us, is eminently sound. Too many public information programs have scattered their shots at the outset, trying to do a job in a large number of states and never achieving any real impact anywhere. Thus we concur heartily with your decision to move on three states initially, developing in them a "package", testing it to get out the bugs, and then transplanting it elsewhere.

(Parenthetically, we have been very active for margarine in two of the three states in which you are immediately interested—New Jersey and Ohio.)

Assuming that your appeal will be to the pocketbook nerve and to highway safety, it seems to us that many of the consumer groups with which we have been working in these two states can be enlisted in your campaign through contacts already established.

As we conceive your program—without the benefit of extensive explorations with you—it should involve initially:

1. Publicity directed toward the cost and safety angle.
2. Immediate efforts to line up various disinterested groups (non-railroad groups, that is) behind your objectives and to articulate them on the subject.
   This activity is given a priority over direct action by the railroads since we believe that a great amount of emphasis should be placed on enlisting third party groups to carry the ball for you. It should be the keystone of your campaign. In other words, by having others talk about the menace of heavy, overloaded trucks we get away from adverse public reaction to a story which, if pushed initially by the rail-

roads would simply be an attack on a competitor with a distinct flavor of "griping" or "poor me—look what they are letting the other fellow get away with."

a. Women's clubs

b. Civic groups

c. Taxpayer groups

d. Safety organizations—both local and state

e. Railroad suppliers and others with a direct pocketbook interest in the success of your endeavors

3. An education program not only to the above groups but to those with a more immediate interest in the situation:

a. Railroad employees

b. Railroad stockholders

c. Insurance companies holding railroad securities

4. Introduction of appropriate legislation in the legislatures of the states involved (or lining up a demand for enforcement of existing statutes if that is called for).

5. Advertising as a follow up—to be used to point up issues and to bolster the ground swell of public clamor for action that would be created by items 1, 2, 3 and 4 above. In other words, we believe that advertising might sound too much like special pleading if it were used to launch the campaigns and that it will come much more naturally at some later stage in the program.

We were asked by Mr. Deegan to suggest the fee which Selvage & Lee would expect for handling a program of this

scope. We operate on a fee plus out-of-pocket expenses basis and it is a point of pride with us that we spend a client's money as carefully and as wisely as though it were our own. A normal fee for an undertaking such as you have in mind would be $5,000 per month, though, as we told Mr. Deegan, the fee is secondary in this case because it is a job we want to do.

We do not believe we should attempt to suggest an over-all budget at this time.

## Summary

We believe your projected program fits in amazingly well with our organization and that we have already a knowledge of the problem that it would take others months to acquire. Mr. Selvage expects to make this program, and the marshaling of the supply industry back of it, his primary responsibility both as to long-range planning and day-to-day supervision.

Beyond that there is little more than we can say except to reiterate the hope that you will select us for this assignment.

## EXHIBIT P-199.

### REPORT OF SUB-COMMITTEE ON PUBLIC RELATIONS

The eastern railroads are deeply concerned with the diversion of heavy inter-city freight traffic to the highways. It is felt that this diversion is not justified by the comparative economy between rail and highway transportation but rather that it has resulted from public policy which levies all cost of railroad transportation on the companies which operate the railroads and in turn on the patrons of railroad service. On the other hand the cost of building and maintaining highways used by inter-city trucks is borne principally by tax-paying citizens rather than by the operators or patrons of the service.

The result is obvious and well-known to all the executives in this room. To state it briefly, the charges for inter-city truck transportation do not reflect the true cost of the service and thus are often deceptively low. In a time of wide-spread corporate cost-cutting, this deceptive price tag has poured a heavy volume of freight traffic on the nation's highways which were never built to handle it.

The highways have been largely broken up by this inordinate accession of traffic—and they can never be repaired and maintained adequately with present revenues from highway users unless, (1) charges for commercial use of the highways by heavy vehicles are raised to a point commensurate with the damage their vehicles do to the highways, (2) unless present limitations on the weight and size of commercial vehicles are more rigidly enforced—and (3) unless size and weight limitations are adjusted.

The true cost of building and maintaining highways for use by heavy commercial vehicles should be assessed against such vehicles.

This would eliminate the unfair shifting of those true costs onto the tax-paying citizens and off the patron of the service. Thus the result would be an equitable competitive basis between the rails and the highways.

If the foregoing premise is correct, it is the recommendation of this committee that the following things should be done:

That the subcommittee on research provide the subcommittee on public relations with the following basic information:

1. The conclusion of the Illinois and California studies, or any other objective source available without additional study, as to what compensatory charges for the use of highways by heavy vehicles ought to be—compared to *actual* charges in each of the 17 Eastern states.

2. The conclusion from any other objective and official source, now available, as to what proper limitations on the size and weight of motor trucks ought to be, in the public interest—compared with the actual limitations in each of the 17 Eastern states.

3. Information as to what would constitute adequate machinery of enforcement of limitations on weight and size of motor vehicles; the status of enforcement of such limitations in the 17 Eastern states; and an official statement, if available, as to what the machinery for adequate enforcement ought to be.

4. The status of so-called "reciprocity" as to motor vehicle fees in the 17 Eastern states, with statements from official sources, if available, about the undesirability from the standpoint of public interest, of the extension of "reciprocity" to long-haul vehicles, operating for profit.

5. The status as to "anti-diversion" amendments to constitution of the 17 Eastern states, and the effect of such provisions on exempting commercial highway traffic from

the payment of any part of the costs of general Governmental service.

6. Information on the legislation adopted or proposed from 1948-1949 sessions of State Legislatures affecting commercial highway transportation.

7. Information as to the use of oil fuel and lubricants by the railroads, the rate at which such consumption is growing—together if possible, with comparative figures on the purchase of these products for use in the heavier commercial vehicles; and comparative information on the importance to the manufacturing industry of diesel locomotives and heavy trucks.

8. Information as to the comparative original and upkeep cost and present state of preservation of highways from which trucks have been barred—contrasted with similar figures on comparable highways which trucks have been free to use.

9. The best figures to show the volume of inter-city traffic by highways in comparison with railroad ton miles broken down by states if possible; together with comparative revenue figures.

10. The summary of the most recent position of the Federal Roads Administration on the question of damage to the highways by trucks of excessive weight and the remedies for this situation, if any, either expressed or implied by the Federal Roads Administration.

11. Such information, as is available, on the development of toll roads in the various states, particularly in the east.

12. Any and all other provocative and pertinent information which the subcommittee on public relations can use effectively in dramatizing the competitive inequities of this problem.

It is the judgment of the subcommittee on public relations that while our interests involve 17 states, this campaign should be concentrated first in two or three important states where the competitive inequities are most evident. If our campaign develops a pattern in each of these two or three states, the other states would be brought into the program as the campaign develops. From a public relations standpoint, your committee feels that these states should be New York, New Jersey and Ohio.

We further feel that this entire campaign whether it be one state or seventeen, should be governed by what we shall call the "Third Person Technique." That is to say that the battle for public opinion will be waged by public interest groups other than the railroads. For example, State Railroad Associations, Taxpayers' Groups, Railroad Employees Associations, Safety Councils, Parent Teachers Associations, Chambers of Commerce, Railway Suppliers, and other public-spirited organizations with a selfish local interest. The emphasis at all times would be placed upon the selfish local interest of the individual tax-paying citizen, or family motorist, inasmuch as your committee believes that in matters such as these, the man in the street is unsympathetic to the railroads or for that matter any large public utility. The appeal throughout the campaign will be to two phases of human interest—a man's pocketbook and his safety.

Although the campaign in each state will by necessity be guided by the nuances of the local circumstances in that state, the general theme and objectives of the campaign will be set, with the approval of the railroad executives, by the Policy Committee, based on recommendations by the Public Relations Committee. Hence, in the execution of this campaign, we feel it is essential that a so-called pilot plant be established and tried in the first of the key states using the aforementioned techniques as well as the usual public relations devices with the various media of com-

munication. These would include of course, newspapers, magazines, radio, news releases, television and direct mail.

We visualize it will embrace both the editorial word and the paid advertising word. We also recommend the establishment of a public speaking bureau which would be extremely effective in building favorable public opinion by word of mouth.

Your committee also recognizes that unlike the usual public relations campaign to build good-will for a commercial enterprise, this one is unique in that it must not only build the good-will but also "close the sale" which, through the guidance of our Committee on Counsel, will effect the necessary legislation or taxation. In this regard, we recommend that the Public Relations Committee and the Committee on Counsel work closely together in the various communities involved.

It is the judgment of the Public Relations Committee that a responsible and qualified agency be retained to work full time with the members of the Public Relations Committee on developing minutely all the details of the so-called pilot plant. It is further recommended that such an agency be augmented by a small staff of full time paid personnel to begin immediately the analysis of material provided us by the Research Committee and to assist in the time-consuming job of negotiating with our allies—State Railroad Associations, Tax-paying Groups, Safety Councils, etc.

In conclusion we recommend a campaign budget to cover the three states aforementioned on the basis which we earnestly contemplate of $500,000 and that an initial budget (included in this total) of $100,000 should be appropriated to cover staff expenses through the summer months.

## EXHIBIT P-231.

### EASTERN RAILROAD PRESIDENTS CONFERENCE RESEARCH COMMITTEE

June 20, 1951

Mr. Walter Tuohy, Chairman,
Special Transportation Committee.

Dear Mr. Tuohy:

Activities of the Research Committee for the past two years:

1. Three thousand pages of material relating to the commercial operation of big trucks on public highways have been assembled in twenty volumes and distributed during the past two years to members of the Policy, Public Relations, Legal, and Research Committees—also to the various State Railroad Associations in the 17 Northeastern states, several railroad brotherhoods, railroad executives, and the Carl Byoir group.

2. No two states follow the same program in dealing with the big truck situation. To give the railroads of each of the 17 Northeastern states the benefit of the activities in the other 16 states a special distribution has been made every few days during legislative sessions. As a result, good points advocated by a particular state have, in some instances, been adopted by other states.

3. Special distribution was made of the New York mileage tax act.

4. Much material has been collected showing enforcement activities in each of the 17 Northeastern states—maps prepared showing location of weighing stations. This survey indicates that no state has enough weighing equipment and most states are using outmoded scales. There is great need for more equipment and more enforcement. State administrations are realizing more their responsibility in the use of public property for

private profit, but there is a big field for further progress along this line.

5. Maryland road tests were checked by engineers and distribution made of all available material regarding these tests.

6. Several meetings held between the three Chairmen of the Subcommittees and the Automobile Manufacturers Association. Reports were prepared showing areas in which there was agreement and also areas of disagreement.

7. Research Committee has acted more or less as liaison between State Railroad Associations and the Carl Byoir group. In June, 1949, the Policy Committee named the states of New Jersey, New York and Ohio as trial states. The Carl Byoir group, under the direction of Mr. Girdler, placed the facts before state administrations and otherwise gave the states a vast amount of help, resulting in favorable truck legislation in New Jersey and New York.

8. The Mileage Tax Bill, which passed the New York legislature in April of this year, was of outstanding importance. This is the first state east of the Mississippi to put a substantial mileage tax on trucks. Other states are watching this development. The New York authorities advise that they expect to build 50 weighing stations scattered throughout the State.

9. After the New York Bill passed, the Carl Byoir people concentrated on Ohio. A Bill was passed increasing truck license fees about 30%. There is much more to be accomplished and the campaign will be resumed at the next session of the legislature.

10. The first of June, the Railroads of Pennsylvania unanimously requested the help of the Carl Byoir people, and a man has been assigned.

11. The Security Research Bureau of Philadelphia has called on the Committee for material on the truck situa-

tion. This Bureau is financed by a group of banks and financial houses along the Eastern seaboard. Its sole function is to advise these financial houses about railroad securities. The Bureau has recently put out a comprehensive report indicating that some of the competitive inequalities between railroads and long-haul trucks are being adjusted by legislative action.

12. Studies made to show that a gallon of diesel oil produces on the railroad seven times as many ton-miles as a gallon of gasoline consumed by trucks on the highway.

13. Information collected showing that Eastern Railroads made the following purchases during 1949—

| | |
|---|---|
| from automobile industry .... | $106,535,000 |
| from petroleum industry ..... | 83,007,000 |
| from rubber industry ..... | 5,374,000 |
| | $194,916,000 |

The purchases from petroleum industry are greater than the purchases made by the long-haul trucks in the 17 northeastern states.

Yours very truly,

H. W. Dorigan
N & H

R. M. Edgar
B & M

J. M. Fitzgerald
VPERPC

C. W. Meyer
Div oper-research C & O

F. N. Nye
NYC

B. S. Voorhees
NYC VP

R. J. Littlefield,
Chairman.

**EXHIBIT P-282.**

VETO NO. 48

January 21, 1952

SENATE BILL 615

I file herewith in the Office of the Secretary of the Commonwealth with my objections Senate Bill No. 615, Printer's No. 511, entitled "An Act to further amend the act, approved May 1, 1929 (PL 905), entitled 'An Act for the protection of the public safety, regulating the use of highways, and the operation of vehicles, tractors, street cars, trackless trolley omnibuses, bicycles, pedestrians, and the riding of animals upon the highways, of this Commonwealth; providing for the titling, including liens, encumbrances, and legal claims; registration of certain vehicles and licensing the operators thereof, upon payment of prescribed fees; prescribing and limiting the powers of local authorities to deal with the subject matter of this act; conferring powers and imposing duties upon the Department of Revenue, the Department of Highways, peace officers, mayors, burgesses, magistrates, aldermen, justices of peace, the courts and the clerks thereof, owners of vehicles, and garage keepers; providing that records are admissible as evidence; imposing upon owners, counties, cities, boroughs, incorporated towns, townships, within the Commonwealth, liability for damages caused by the negligent operation of their motor vehicles; imposing penalties; imposing certain costs upon counties; providing for the disposition of fines, forfeitures, fees and miscellaneous receipts; making an appropriation and providing for refunds;' by increasing annual registration fees for certain commercial motor vehicles, truck tractors, trailers and semi-trailers; prescribing additional equipment requirements for certain vehicles; increasing the maximum gross weights and axle loads al-

lowed for certain vehicles; changing the requirements for weighing vehicles and removal of excess loads; prescribing and changing penalties; providing that certain penalties shall be enforced by liens upon vehicles and the sale of such vehicles, free of all liens and encumbrances, and imposing duties upon operators, owners, magistrates and sheriffs."

This bill would amend the Vehicle Code, Act of May 1st, 1929 (PL 905), among other things, by increasing the permissible gross loads of various classes of commercial vehicles and combinations of motor vehicles and trailers, truck tractors, and semi-trailers, as well as the permissible tandem axle loads. (SEE FOOTNOTE (1))

Being mindful of the observations of Mr. Chief Justice Gibson over a century ago, that in Pennsylvania the highway "is the property of the people, not a particular district, but of the whole State", (Philadelphia & Trenton Railroad Company 6 Wharton 25, 43 (1840)), I was motivated by the strong and determined opposition to this bill to call a public hearing, to enable the opponents and proponents thereof to present their respective views before making a final decision, either to approve or disapprove it.

A hearing was held in the Executive Office at the State Capitol on Thursday, January 17th, 1952. A myriad of views were presented by representatives of various civic, municipal, labor, industrial, and railway organizations, and the trucking industry of Pennsylvania itself.

I am fully mindful that the trucking industry plays a significant and important role in the economic and community affairs not only of this Commonwealth, but also in the entire Nation. I am not convinced that it pays its just share of the maintenance of our public highway system.

I am also mindful of the possible destructive effects which, as demonstrated by the tentative findings of the Highway Research Board of the National Academy of Sciences, based on actual tests during the last year and a half on a section of highway built by the State of Maryland

in 1941, may result from the increase of permissible gross and axle loads.

I should point out, however, that all of the information available to me was *not* available to the Legislature when this bill was being considered by it.

Ordinarily, in such a matter as this I would feel constrained to accept the legislative views, but after careful and thorough consideration, especially in view of the critical shortage of materials which are used in highway construction projects, I am convinced that the wisdom of subjecting our highway system—a $1,700,000,000 investment—to additional burdens should be carefully considered by the Legislature in the light of the final findings and recommendations of the Highway Research Board, which unfortunately will be published too late for me to consider. If the Legislature in the light of the final report and recommendations of the Highway Research Board, as well as other matters which I mentioned herein, again adopts the basic policy of this bill, I would hardly have any choice in the matter, for the Supreme Court has stated that:

> "it is for the Commonwealth acting through the Legislature to direct conditions in which * * * (the) right (to use the highway) shall be exercised." (Commonwealth versus Funk 323 Pa., 390, 394, 395 (1896)).

Deferring the policy of this bill will not in the meantime seriously handicap the trucking industry of this Commonwealth during the period of time required for further legislative consideration—a year. The tandem axle weight allowed by this bill, I am informed, will be lawful only in a very few States.

This bill contains some inconsistencies, for instance: I am informed that the permissible gross of Classes Y, Z, and ZZ can only be attained by exceeding the permissible axle load, which, of course, is not a desirable situation.

(See Footnote (2))

Furthermore, the $25 fine provided by this bill for violations of the permissible axle load—in my opinion, a very serious matter,—is woefully inadequate as an effective deterrent.

Last but not least, legislation of this nature should contain specific limitations predicated on all of the factors generally regarded by public highway authorities as related to the preservation of our *entire* highway system, including not only primary, but also the secondary and rural facilities. In short, it should be made just as unprofitable for a vehicle or combination to violate load restrictions on posted highways and bridge facilities imposed by the Secretary of Highways and local authorities, pursuant to law, as to violate the permissible gross load which this bill would establish. This bill is entirely inadequate in that respect.

For these reasons the bill is not approved.

(Signed) JOHN S. FINE,
Governor.

FOOTNOTES

(1)—Theoretically, tandem axle loads are not increased by this bill, but actually, however, under the presently existing permissible gross, it would be impossible, if the loads were properly distributed, to obtain a load of 36,000 pounds on a tandem axle of a semi-trailer.

(2)—This very bill would impose a fine of $100.00, plus $2.00 for each 100 pounds or fraction thereof, for violation of the permissible gross by a combination of truck-tractor and tandem-axle semi-trailer.

TAX RESEARCH AND SURVEYS

EDWARD D. ODENBAUGH
*Corporate Tax Service*

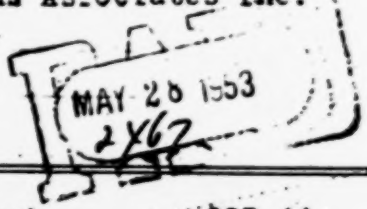
ANALYTICAL STUDIES AND REPORTS

11823 JOAN DRIVE
PITTSBURGH 35, PENNSYLVANIA

Telephone
CHurchill 1-7657

April 1, 1953

TO Allied Public Relations Associates Inc.
745 Fifth Avenue
New York 22, N.Y.




Professional Services, month of March ..... $623.44

Researching and preparing memoranda February 26 to March 4,1953 covering four confidential documents of political nature consisting of thirty legal size single spaced typed pages ~~at request of Mr.Paynter~~, and incidental expenses incurred in performance of above services including long-distance phone calls to Philadelphia and New York, typing expense, postage, and research expense and entertainment expense..... $234.60

Arranging for and participating in conferences at State College March 18 and 19,1953 with Mr.Charnay, Mr.Paynter, Mr.Dietrich, ~~and Sheriff Whitten of Pittsburgh~~, 3 days..... $150.00

Researching and preparing confidential dossier ~~of political nature~~ March 20 to 28,1953, ~~requested by Mr.Charnay at State~~ College conference March 18,1953, consisting of eight single spaced typed pages, and incidental expenses incurred

(continued)

TAX RESEARCH AND SURVEYS

EDWARD D. ODENBAUGH

*Corporate Tax Service*

ANALYTICAL STUDIES AND REPORTS

11823 JOAN DRIVE
PITTSBURGH 35, PENNSYLVANIA

Telephone
CHurchill 1-7697

April 1, 1953

TO Allied Public Relations Associates Inc.
745 Fifth Avenue
New York 22, N.Y.

(Page Two)

Professional Services $

thereto including long distance phone calls to New York, Typing expense, entertainment and research expense.....$138.84

For services rendered in conferences with Mr. Paynter at New York March 29, 1953 re above confidential documents, and other matters in the interest of PMTA, 1½ days.....$100.00

Total $623.44

MAY 28 1953
2467

BKUP APRA
PMTA 623.44

B 87

**EXHIBIT D-25.**

NEW YORK WASHINGTO

HILL AND KNOWLTON, INC.
*Public Relations Counsel*
EMPIRE STATE BUILDING, NEW YORK 1, N. Y.

JOHN W. HILL

July 12, 1949

Mr. Thomas J. Deegan, Jr.
Vice President-Public Relations
The Chesapeake and Ohio Railway Company
405 Lexington Avenue
New York 17, New York

Dear Mr. Deegan:

This letter will confirm my statement in your office on July 5 that Hill and Knowlton, Inc. would be glad to be considered for the assignment which you outlined on behalf of the Eastern Railroads.

It is my understanding that the public relations firm to be retained will be charged with the dual responsibility of marshalling both public and legislative support in 17 states for some form of strict regulation of the use of heavy trucks on public highways. The purpose of this proposed legislation is to correct the unfair competitive advantages which heavy trucks now have over the railroads.

If retained for this work our first step would be to make a comprehensive study of all aspects of the problem as a basis for developing detailed recommendations to your committee for a campaign of action.

Your suggestion that the campaign be limited to a pilot operation in a small number of states seems sound to us, and our initial proposals would be on this basis.

Since the success of the campaign will depend in large measure upon the support given the railroads by other

groups and organizations, one of our first efforts would be to discover all the present and potential allies in the fight on heavy trucks. All possibilities would be explored, including public officials, trade and civic groups, taxpayer organizations, safety groups, educators, parent-teacher groups, labor unions, motorists, airlines and many others.

There are many indications that the time is now ripe for the Eastern Railroads to lead an organized attack on the heavy truck evil. The failure of the heavy truck operators to do anything to lessen the elements of public inconvenience, the nuisance, and the evils of these mammoth vehicles, has already resulted in widespread resentment against them, and has brought forth attacks from such powerful organizations as the American Automobile Association. In February that Association called attention to the "unconscionable damage" our roads are sustaining because of the operations of a small segment of the trucking industry. Their statement urged cooperation of all groups in an "all-out drive to protect the highway investment" and urged action by state legislatures.

In addition, certain public officials have joined the attack. The federal commissioner of public roads stated in a recent speech that heavy trucks were "causing a destructive waste of highway funds." At the moment the taxpayers in the vicinity of Darien, Conn., are complaining bitterly over plans to expend $2,000,000 to accommodate various underpasses to large trucks. The piling up of this kind of public criticism is helping to prepare the public mind for your proposed campaign.

We are heartily in accord with the decision to carry on the campaign under the forthright sponsorship of the Eastern Railroads. At the same time, it may be necessary in practice to have a rallying point for the activity in the form of a distinctive organization or "Committee"—the chief sponsor of which will be publicly known at all times as the Eastern Railroads. The name of the "Committee" should imply a *positive* program, expressing in short popular

slogan form the gist of the legislative objectives. This device would facilitate and simplify the participation in various ways of other groups in the program of activities.

The campaign should utilize in every way possible the many individuals, groups, organizations and facilities through which the railroads have contact with the public and the opportunity to win public opinion. It is to be assumed that the railroad brotherhoods would be natural allies in this effort. Any representation which the railroads maintain at the state capitals also logically would be available for effective cooperation.

In developing the campaign it will be necessary to do everything possible to counteract the charge that the fight is one between the railroad "octopus" and "little fellows" in the trucking business. Trucking interests have have always carefully preserved the fictitious idea that they are small business and that any attack upon trucking is an attack upon small business. It should be possible to strip large truck operators of their "little business" cloak, and to show that genuine little fellows who operate small trucks are under no attack, but actually are one of the victims of the heavy trucks.

It is understood that the development of the basic legislative objectives is a problem for your research and legal committees. We should observe, however, that adequate allowance for public relations considerations in the planning of these objectives is essential to a successful campaign. For example, if the basic legislative objectives were similar to, or a logical extension of, the principles contained in the Code of the state highway officials, which is supported by the American Automobile Association, the task of winning public acceptance would be greatly simplified. A legislative program not in harmony with this Code would obviously require a more intensified and costly campaign. The framing of the basic policy objectives should also, if possible, take into consideration the views of politically powerful groups such as the Teamsters Union, and the farmers. If

the campaign can claim a saving of wear and tear on public highways and roads, and in taxes for the farmers, and in increased job opportunities for the teamsters in small trucks, it may be possible to win over or conciliate both of these powerful groups.

Essential to the success of the campaign will be a completely non-technical and popular presentation of the problem to the public. The job will be to dramatize popular emotional appeals around such ideas as the road nuisance created by large trucks, their menace to motoring safety, their damage to roads and their subsidization by the taxpayer's dollar.

The campaign, of course, will involve intensive grass roots work throughout each of the states where the program is in operation. Men in the field must be competent to contact newspapers and local groups of all kinds, arrange meetings, plan talks for others and make talks themselves. Men at the state capitals must also be skilled in legislative contacts.

In order to supply tools for these field forces, adequate materials must be produced in the form of publicity, speeches, leaflets, booklets, material for radio and television, visual presentations for use before civic groups, etc. As part of the job, advertisements in local newspapers throughout the state when the campaign is being conducted will be necessary.

Hill and Knowlton, Inc. has had extensive experience in dealing with similar public relations and legislative problems both on national and state levels. It has conceived and helped formulate basic strategy and actually executed the detailed activities in such programs as the following:

1. The program for a national air policy resulting in the establishment of the President's Air Policy Commission and enactment of the Congressional Air Policy Board (for the Aircraft Industries Association).

2. The campaign in 44 state legislatures, as well as before the Congress to protect butter against the unfair competition of yellow-colored oleomargarine in imitation of butter. The fort has been held in this fight in the Congress, confounding many predictions to the contrary. In state legislatures prior to 1949 a trend had developed towards repeal of restrictions on oleo, but the policy and program presented to 1949 legislative sessions for the first time resulted in an overwhelming margin for butter.

3. The campaign against unduly restrictive wartime or OPA prices (for the National Retail Dry Goods Association).

4. The campaign against government fertilizer plants (for the National Fertilizer Association).

5. Some years ago, as counsel for the Ohio Oil Industry's Information Committee, our firm operated in Columbus, in fighting gasoline tax increases.

Hill and Knowlton, Inc. is counsel for a number of large industry associations and corporations. We have a staff of more than 70 people with supervisory and producing staff at headquarters in New York, and a field staff at various points. An office is maintained in Washington under the direction of a vice president of the firm, and field offices are located in Pittsburgh, Chicago, and Cleveland, with staff representatives in Cincinnati and Los Angeles.

The cost of the operation over and above the fee would depend upon the number and caliber of the men in the field, the amount of and cost of materials and numerous other factors. In the absence of a detailed program, obviously no exact estimate is possible. The success of the job will depend on the competence of the men in the field and upon the quality of supervision. Also, within the limits of reason, the more men in the field, the more intensively the grass

roots will be cultivated. Of the three states suggested, New York and New Jersey have regular legislative sessions in 1950, while the next regular legislative session for Ohio convenes in 1951. Probably it would not be necessary to put men in the field in Ohio until next year, one of the variable factors affecting costs.

Since your initial appropriation covers the period to next January, I assume you want an estimate of costs for the final five months of the year starting as of August 1. Our rough estimate is that the cost of the public relations operation for that period would range from $120,000 to $130,000. The actual operating experience of these months will provide a basis for more exact estimates for the future. We operate on a monthly or annual fee, plus all out-of-pocket expenses, the amount of the fee being based on the nature of the operation and the degree of responsibility involved. Your assignment calls for counsel to assume responsibility for the planning and execution of the program from grass roots publicity and organization through final action by the several legislatures. On that basis our appraisal of an equitable fee would be $20,830 to the end of this year, or at the annual rate of $50,000. Although during the "pilot" period the operation would not be as extensive in scope as when the program is in full swing in all the other states, yet that initial period is crucial and will set the pattern for the entire program.

As you know, our firm produces and places institutional and public relations advertising for some of our large clients, and we would be prepared to handle the advertising phases of your program, if you so desired.

If you desire any additional information on any point in this letter, please do not hesitate to call on me.

Very sincerely yours,

JOHN W. HILL
John W. Hill

JWH:rc

## EXHIBIT D-26.

FRED ELDEAN ORGANIZATION
INCORPORATED
670 Fifth Avenue . New York 19, N.Y.
Eldorado 5-7651

July 13, 1949

Mr. Thomas J. Deegan, Jr.
Vice President-Public Relations
Chesapeake & Ohio Railway Company
4500 Chrysler Building
New York, New York

Dear Mr. Deegan:

Your committee is concerned with a serious problem, and you have asked us to indicate generally the approach we might use to deal with it should our organization be retained.

Basically, there are two approaches—one aimed at creating a general atmosphere of public understanding, the other directing efforts toward a specific objective. Your committee, naturally, will have to make the decision. We can follow either approach, utilizing the appropriate techniques for each. We prefer to follow the second approach of working directly toward an objective as we believe that thereby not only do we advance the objective but we also create a better and broader general atmosphere of public understanding.

Several years' experience in the Tax Foundation demonstrated repeatedly that we could get broader general tax-consciousness when we pursued a specific objective, than when we went out on a general basis of trying to make people tax conscious. Application of the same principles and techniques to the specific problems of business and industry has proven equally effective.

We like the direct-action drive to get a result. Whatever reputation we may have has been achieved by our willingness to tackle a hard-hitting job and see it through. We have specialized in this approach and our staff has had long experience in its application. The technique of intensified merchandising of ideas at the community, State and national levels, by trained public relations field operators, has been a distinguishing characteristic of this organization. In one campaign—in which only seven weeks were available—application of this technique produced the following results:

17,000 newspaper stories, with accompanying sympathetic editorials, cartoons and features.

A meeting in every county, town and hamlet in the State of New York, with 7,000 individuals paying their own way to Albany.

1,000,000 communications to the Governor.

A reversal of a 26-year trend in the State.

Defeat of a powerful and highly organized lobby, including such groups as state employees, teacher groups, road-builders, cement and other highway interests.

The result was not a mere holding of the line, it was an affirmative gain in the way of a cutback, including elimination of the State Real Estate Tax, which burdened, among others, railroad transportation in New York State. Newspapers as far as San Francisco and Los Angeles carried front-page banner headlines.

Extension of this experience was gained through several years of intensive work in furthering, developing or expanding tax organizations in thirty-eight states.

On the Federal level, experience is represented by such activities as operation of the "17 Airlines" campaign, which overcame a powerful and well-organized opposition despite their carefully laid groundwork for the objective of a "chosen instrument" or monopoly in international air

travel. At the conclusion of this campaign, Time Magazine commented:

> "Two months ago, the Senate Subcommittee seemed on the verge of recommending to Congress that the U. S. adopt a chosen instrument policy . . . . At week's end, with no more than three committee members in favor of it, the Community (chosen instrument) Company seemed dead." It was dead.

These are a few examples of a long background of experience in dealing with problems, the answers to which required ultimate legislative understanding and support. Our experience of many years, with many State legislative groups, dealing with many problems, has caused this organization to be recognized as a pioneer in the technique of the organized field approach, which we have extensively employed.

We therefore, assuming you have your objectives clear and already have your supporting data, would proceed with a field manpower organization in such selected areas as you might designate. After some preliminary groundwork and with your approval, we would start an aggressive direct-action campaign to achieve the objective. We have found that dramatic incidents help focus attention on public issues. We have consistently used this technique in other campaigns, and we would expect to do so as this campaign moved along.

In addition to utilization of the field men in the areas involved, we would also cover the general publicity media and channels to further a broad general background. We would utilize the appropriate techniques to get a full public airing of the issue before all possible forums. We believe that advertising can be used effectively when it is tied in with a direct campaign.

We recognize and have utilized spot and minimum-cost public opinion checks to get a "wind" on the direction in which

we should veer. We appreciate that there are also a number of indirect things that might be done which we would consider in laying out a concrete program.

Naturally, it would be necessary for us to have further discussion with you before attempting to outline budget requirements. It is difficult to be positive in relation to a fee as that also would require more facts than we have at the present time. Based upon our experience and the probable magnitude of the job, and assuming that we would have complete responsibility for the personnel and the conduct of this action program, our general retainer and management fee might be in the neighborhood of $75,000.00.

We would welcome any questions that might arise or further discussion with you, should that be indicated.

Sincerely yours,

FRED ELDEAN
Fred Eldean

## EXHIBIT D-212.

### Highlights of PMTA's Record.

1928—PMTA Charter granted and recorded May 5, individual and county groups organizing on state-wide basis as result of legislators' advice to present and sponsor unified program desired by trucking industry.

1929—Law passed boosting license fees 60% on solid tire trucks.

1930—State Headquarters opened in Harrisburg, desk space in one office (April), W. A. Sutherland, appointed general manager.

Safety program started by support of national projects.

Legal Department established.

Chapter organizations started.

1931—Law passed imposing gross receipts tax on buses and for-hire trucks.

Membership passed 500 mark.

Monthly bulletin expanded coverage to include national and state regulations and laws affecting trucking industry.

PMTA originated and began issue of "Courtesy of the Road to You Tags", in continuing safety and courtesy program.

1932—Law passed fixing a 15-day limit for reciprocity on out-of-state trucks, at special session of legislature starts PMTA on reciprocity campaign against barriers.

PMTA defeated proposed laws to:

1. Turn all motor funds over to general fund. Anti-diversion fight started.
2. Turn all gasoline taxes over to general fund.
3. Permit cities of first-class to tax each truck $100.

4. Permit other cities and boroughs to tax trucks.
Stressed value of public relations program.

1933—PMTA sponsored law to repeal the 15-day limit on out-of-state trucks was passed, first major PMTA victory for reciprocity privileges.

2500 attended PMTA sponsored Phjladelphia mass meeting protesting unreasonable restrictions on highway transportation.

PMTA directors went on record for law observance and law enforcement.

PMTA sent delegates to Chicago, took leading part in organization of American Highway Freight Association. Ted V. Rodgers, PMTA president, elected president of AHFA, retained as president in October of American Trucking Associations, formed by merger of AHFA and Federated Truck Associations.

PMTA defeated first attempt to pass law banning trucks from highways on Sundays and Holidays.

1934—First PMTA Convention held in Pittsburgh June 21 to 23.

Eastman reported on transportation—digests given.

Penntruck—PMTA name adopted for monthly bulletin in June issue.

First ATA Convention held in Chicago, October 22 to 24, many PMTA members there.

PMTA enlarged legislative committee to include additional classes of carriers.

State NRA Code for trucking industry started under National Industrial Recovery Act with PMTA members serving on Code Authority.

First use of "Courtesy of the Road to You" emblems on field representative's car shown in photos published in PMTA bulletin.

1935—Proposed laws to increase truck license fees, reduce truck size and weight limitations were defeated in legislature.

Proposed "port of entry" bill defeated.
Chapter safety committees organized.
PMTA again blocked attempt to keep trucks off roads on Sundays under old Pennsylvania "Blue Laws".
Campaign started to halt damage and destruction of highway signs.
Chart issued in colors showing lighting required on trucks.
PMTA manager named on State Department of Revenue Highway Safety Advisory Committee.
Motor Carrier Act became effective. PMTA Legal Department gave digest of requirements for interstate operators.
Pennsylvania Turnpike endorsed.

1936—PMTA members called for emergency relief service following state's worst floods.
State's new safety slogans issued.
19 radio stations used for broadcasts against tax and motor fund diversions.
PMTA issued declaration of 12-point policy. Policy Committee organized.
Officers issued news releases on weather damage to roads and against motor fund diversion to other than highway uses.
Road hazard reporting asked to correct dangerous conditions, spur repairs.
General Manager calls for constructive legislative program, reports PMTA has been through severe defensive struggles at 8 legislative sessions.

1937—Public Utility Commission law passed with major truck provisions as suggested by PMTA remaining practically unchanged.
Motor Code omnibus amendments passed with many restrictive parts removed as result of PMTA activity.

Bridge and underpass reports started after five-year effort by PMTA to have such information made available for state-wide distribution.

PMTA succeeded in obtaining amendments to wage and hour law regulations to exempt truck operators.

PMTA sponsored broad reciprocity law was approved.

W. A. Sutherland, first PMTA general manager, resigned.

1938—PMTA urged change in license year end to March 31.

PUC asked PMTA assistance in new uniform rate setup.

Survey made on tolls in Holland tunnel and George Washington Bridge to get reductions.

PUC adopted most of PMTA recommendations in revision of its General Order 29.

Maintenance division gave efficiency and economy tips.

Truck drivers given nine suggestions for improved, efficient operation.

PMTA organized Highway Safety Division, subsequently designated as Accident Prevention Division.

1939—PMTA won first stay in banning car carriers.

"U"-weight increased from 13,000 to 15,000 pounds.

Sunday and Holiday ban again defeated.

Public Relations Division established.

PMTA won for first time the ATA trophy in National Truck Safety Campaign.

First Roadeo held October 14 at State Farm Show grounds.

Business Tips classification started in "Penntrux" enlarging service started several years earlier in bulletins to PMTA members.

1940—PENNTRUX name adopted with January issue, Vol. VII, No. 1.
Telegram sent to Federal officials pledging PMTA support of national defense.
State Headquarters enlarged to four rooms.
Safety caravan tour sponsored, headed by State's first champion safe truck driver, PMTA sponsored; ended at Conneaut Lake, 2nd Roadeo.
PMTA won ATA Safety trophy a second time.
ATA started National advertising campaign of general value to trucking industry.
Pennsylvania Turnpike opened.

1941—"Singing Wheels" movie on trucking industry by Motor Truck Committee of Automobile Manufacturers' Association, shown first in Pennsylvania February 19 to Philadelphia Chapter PMTA.
Long battle in Legislature for "full load" truck bill in which PMTA was entirely cleared of anti-trucking attacks. Bill finally passed by Senate and House but vetoed by Governor James.
PMTA mass meeting held in Harrisburg, August 25 to protest veto.
Third Roadeo held at Indiantown Gap.
PMTA effected toll savings for members through volume use of Pennsylvania Turnpike.
PMTA at start of War December 7, at once began quick service to members on all developments affecting trucking industry.
Car carrier ban postponed a second time.

1942—PMTA obtained rate increases for truck operators on parity with increased rates granted railroads.
First Weekly Service Letter issued February 16.
PMTA cooperated with Civilian Defense Organization.
PMTA supported war bond drives.
PMTA Exhibit at Farm Show drew record crowds.

PMTA cooperated with ODT on conservation of motor equipment.

New railroad attempt to limit truck hauls to 300 miles defeated.

1943—Legislative Session results most successful in PMTA history.

"Full-Load" bill increasing weight limits temporarily passed.

Half-ton truck fees reduced.

Car carrier ban stayed for the third time.

Bill passed for vote on constitutional amendment to halt diversion of motor funds.

PMTA members warned of railroad propaganda for domination of transportation field through integrated systems to operate all rail, motor, water and transportation facilities in large geographic areas.

Monthly Progress Report of PMTA accomplishments started in Penntrux.

Won permanent possession of ATA safety trophy.

1944—Membership campaign organized to increase effectiveness of PMTA and push post-war plans.

PMTA gave continued assistance to all Federal agencies in war program, aided members in manpower, tire, gas rationing crises.

Legislative plans mapped for 1945.

Asked Chambers of Commerce not to pass railroad backed transport integration resolutions.

1945—Law passed by Pennsylvania Legislature to make temporary weight gains of 1943 permanent.

Law passed repealing 1937 legislation which banned car carriers from highways.

Anti-diversion amendment act passed again putting question on November ballot.

Voters in November passed amendment 6 to 1 to prohibit diversion of motor funds to other than highway use.

Postwar Planning Conference held by PMTA in Harrisburg.

1946—Golden jubilee of automotive transportation marked.
Six PMTA members elected as officers of ATA.
W. C. Solly appointed service director, new department of PMTA which now handles directly all personal services required by members.
Revenue Department approved reflector type flares authorized in PMTA sponsored law passed in 1945.
PMTA participated fully in Courtesy and Safety Campaign of ATA.
PMTA cooperated fully with State Police in safety campaign.

1947—Prepared 12 advertisements for truck owner use in local communities.
Inaugurated "Driver of the Month" awards.
Obtained passage of Tandem Axle Semi-Trailer Bill in House, but bill was blocked in Senate Highways Committee.
Obtained law to eliminate requirement of engine number for truck identity.
Penntrux complete issue in new format September 20 with expansion of Publications Department and installation of new equipment.

1948—U. S. Army called on PMTA to aid in forming Organized Reserve Corps Army Transportation Division in Pennsylvania.
New PMTA Accounting Division organized.
Safety and Accident Prevention Campaign mapped with definite goals set.
Legislative policy plans started in early Spring looking toward '49 session.
New Research Department established.

5/19/48
RS

# PENNSY R R PLOTS AGAINST FARMERS AND THE GRANGE

WHEW
PENNSYLVANIA RAILROAD
DUPED STATE GRANGE OFFICIAL
HONEST GRANGER
BRUCE TAYLOR

**THE PENNSYLVANIA RAILROAD** through its agents, asked Uncle Sam to hold up costs to Pennsylvania farmers. The state's worst tax free rider, the railroad uses your money for slush funds to try to deceive the Grange, to cheat the farmer. A Grange demonstration inspired by a railroad undercover agent preceded Governor Fine's veto of a bill which would have lowered costs for honest Grangers. Can Pennsy's money exacted from farmers nullify the Pennsylvania State Legislature? Read what YOU can do about this scandal.

Exhibit D-61

Exhibit

233b

# *How the Pennsylvania Railroad Preys on Farmers — Coming and Going! The Facts:*

Paul G. Miller is a truckman doing business at Shippensburg, Pa. In a highly competitive business, he found out how he could haul 20,000 pound loads of fertilizer from the Baltimore area and deliver it to farmers in Dauphin and Cumberland counties at a fair price for a 20,000 pound load. His farmer customers were satisfied. He competes with other truckmen, but his principal competitor is the Pennsylvania Railroad.

Then certain restrictions and complications developed, so that he could not legally deliver a 20,000-pound load, on which he could have made a satisfactory earning at the low rates, but could only deliver a part-load of 16,000 pounds. **(Why he was confronted with these restrictions is a story all by itself which we will come to in a moment.)**

But Miller stuck with it. He wanted the business and wanted to hold down his prices to farmer customers. So he went back to the Interstate Commerce Commission and asked Uncle Sam to let him charge the farmers (for a less profitable part load of 16,000 pounds), the same pound-rate he was charging for 20,000 pounds.

But something happened. The Eastern Railroads entered a legal objection to say that if Miller was permitted to charge this low rate to the farmer for a part load of fertilizer THE RAILROADS WOULD HAVE TO LOWER THEIR RATES FOR CARRYING FERTILIZER, NOT ONLY IN THIS AREA, BUT TO AND FROM MANY OTHER POINTS.

The dominating power in Eastern Railroads in the Pennsylvania area is the Pennsylvania Railroad. The Eastern Railroads for this purpose is a lobbying organization, *serving the interests of the Pennsylvania Railroad.*

Now remember how the Pennsylvania Railroad feels about the Pennsylvania farmer: the railroad is scared to death it may have to lower fertilizer rates. This clearly establishes, on the Federal records, its basic feelings.

Now what is the 20,000- pound—16,000-pound business? Pennsylvania has a mixed up hodge podge of regulations the effect of which is to make it hard to operate motor trucks at a fair profit. Who gains from this hodge-podge? The Pennsylvania Railroad. It can keep up its high freight rates against the Pennsylvania farmer, business man and consumer, *if it can keep the truckmen from operating efficiently.*

It is plain common sense that if it costs the truckman more to operate, the higher cost will be passed on to the

## FEDERAL COURT EVIDENCE TELLS HOW BYOIR KILLS LEGISLATION

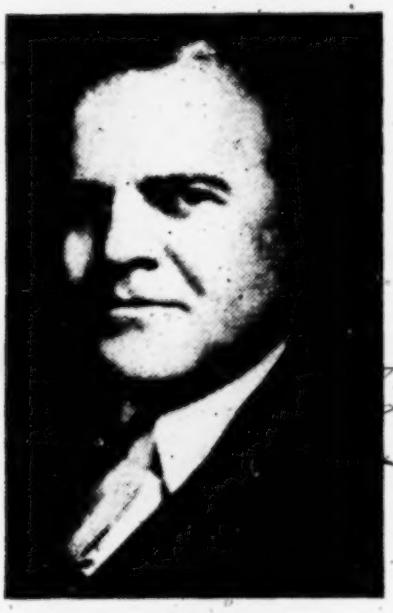
Carl Byoir and his agents have been in and out of Congressional investigations and Federal Court proceedings over a long period of time. In a proceeding in Federal Court for using "false front organizations" in a conspiracy to restrain and monopolize trade, he was found guilty and fined $5,000. In that matter as in this he had invented and used phoney organizations and had misused some good ones.

Some methods used in a Byoir Campaign were disclosed in a letter introduced in evidence describing the Washington lobbying procedures. The letter said, in part:

"I enjoyed (please destroy when you read) most of the shippers I met. The two cowboys from Texas, Mr. . . . . and . . . . . were the . . . *drinkers*, never stopped . . . They were dined at noon by C. Byoir because of their importance. I had them to ball game and they were drinking then even and also killed a bottle the morning they went on the witness stand.

"*Some wanted the other sex and had it, because plenty available at all hours . . .*"

# HOW PENNSYLVANIA RAILROAD PREYS ON FARMERS: FERTILIZER PROFITS USED TO CHEAT THE GRANGE!



BYOIR

Joab K. Mahood, for years paid executive secretary of the State Grange, permitted undercover railroad agent C. Colburn Hardy (right) to let Hardy use Mahood's office to send out undercover propaganda to deceive Grange members to act against their own real interests. Hardy's activities deceiving the Grange were directed by his boss, Carl Byoir (left), paid by the railroads.

HARDY

# HOW THE PENNSYLVANIA RAILROAD PREYS ON FARMERS

(Continued from Preceding Page)

of the Commonwealth, pass a law that by making efficient trucking possible, would lower the cost of fertilizer to farmers and thus force the Pennsylvania Railroad to lower the high charges it levies upon the businessmen, consumers and farmers of the State.

(The Pennsylvania Railroad is used to soaking the citizens of Pennsylvania—for it has managed, without specific exemptive laws, to avoid paying taxes in Pennsylvania that it pays in other states.)

What to do? How could the railroad defeat the Legislature's "Fair Truck Law"?

Well, it would be necessary to stir up some outcry from the Grange and from other organizations *supposed to repre-*

amounts of good hard money. But always the same pattern—hundreds of thousands of dollars used in slush funds to deceive worthy organizations to defeat the public will.

So Pennsylvania Railroad, the dominant interest in Eastern Railroads, had Eastern Railroads hire Byoir.

Byoir carpetbaggers descended upon Harrisburg and moved into the offices of the Grange and other organizations supposed to protect the citizens. They had orders to "kill the Fair Truck Bill at any cost" and plenty of money to do it with. The whole shocking story will come out in due time but just now we are talking only about the Grange.

Remember, the Pennsylvania Railroad wants to charge the farmers of Pennsylvania MORE for fertilizer. Remem-

# GET A WHIFF OF THIS! WHE - EW!

(Continued from Preceding Page)

protests of farmers AGAINST the Fair Truck Bill. After a hearing unlike any in history, and in which other secret agents worked upon other organizations, Governor Fine, assuming a genuine and honest protest was involved vetoed the bill.

A former Byoir agent, Hardy Burt, wrote vicious and misleading propaganda in the National Grange monthly, *which published appropriate railroad advertising.*

So the hodge podge of laws that make it necessary for truckmen to try to make a profit on delivering half a load of fertilizer at a time are still in effect.

The Pennsylvania Railroad with one hand is holding up the farmer, trying to get Uncle Sam to uphold high shipping rates for fertilizer. With the other hand, the Pennsylvania Railroad shells out slush money to deceive the Grange and other organizations representing the farmer's interest.

How do you like that! Well, if you *don't* like it, there's a lot you *can* do about it.

First, ask your National Grange officers to investigate the State Grange Office in Harrisburg, to find out who let the Pennsylvania Railroad, in the person of Undercover Agent Hardy, deceive the Grange.

Then, write the two U. S. Senators from Pennsylvania and your Congressman and ask them:

1. For an investigation of Pennsylvania Railroad's underhanded effort to subvert the Grange. (And ask for public hearings.)

2. To find out who was on the taking end of the railroads' huge slush fund.

### Why the Railroads Killed the Fair Truck Bill: To Keep the Farmer Paying High Fertilizer Rates!

When the Railroads put a paid under cover agent in the Grange office at Harrisburg to kill the Fair Truck Bill, were they trying to help the farmer? When the bill was killed, Truckman Miller wasn't allowed to deliver a full truck load to farmers at his low rate. He surprised the railroads, who thought they had won, by asking ICC to apply his low rates to a partly filled truck. Eastern Railroads intervened and their protest dated last March 24, said, in part:

"If this proposed change of rates is permitted to become effective its use WILL FORCE DOWN THE RATES (for fertilizer shipped by railroads in Pennsylvania)* . . . not only from and to the points here under protest BUT TO AND FROM OTHER POINTS AS WELL.

". . . *and will create unfair and destructive competitive practices* . . ."

In short, the railroads will do ANYTHING to keep up the cost of fertilizer to Pennsylvania farmers.

*Material in brackets inserted for clarity.

3. To find out why Pennsylvania Railroad doesn't have to pay its share of the State's real estate taxes (which it pays in other states). (If it pays up all its share of real estate taxes, for better rural schools, roads, and bridges, maybe it won't have slush fund money to use against the farmer.)

*And*

4. Write Governor Fine and ask him to have the State's authorities investigate how many of the organizations that protested against the Fair Truck Bill were activated by Byoir stooges paid by the railroads' slush funds.

## EXHIBIT D-539a.

Noerr et al v. E. R. P. C. et al.

SUMMARY OF PLAINTIFFS' ANSWERS TO PENNSYLVANIA RAILROAD INTERROGATORY NO. 1(m) RELATING TO OVERWEIGHT AND OTHER VIOLATIONS

Defendant Pennsylvania Railroad served Interrogatories upon 52 plaintiffs. Among such Interrogatories was the following:

"1(m) The times and places since January 1, 1949 that any truck owned or operated by the above named plaintiff was charged by a public official with being operated in violation of the laws of Pennsylvania relating to:

(1) Weight limitations;

(2) Size limitations;

(3) Speed limitations;

(4) Any other limitation or prohibition;

giving the results in each case, the name and office of the official involved and, if a fine was assessed, its amount and whether or not it was paid."

Eleven plaintiffs failed to file Answers to the P.R.R. Interrogatories.(1)

Plaintiff Pennsylvania Motor Truck Association, which operates no motor trucks, did not file an Answer to Interrogatory 1(m). In addition, nine individual trucking firm

(1) The eleven plaintiffs who failed to file Answers to P.R.R. Interrogatories were the following:

Allison Trucking
J. Don Bartlett Trucking Co.
Hennis Freight Lines, Inc.
Hollywood Cartage Company, Inc.
Harry O. Kline Transfer Co.
Jack Landsback Trucking Company
Mooney Bros. Trucking Company
Roberts Freight Lines
Valley Freight Lines, Inc.
Venturella Trucking Company
Warner & Smith Motor Freight, Inc.

plaintiffs filed Answers to Interrogatory 1(m) which were on their face inexact or unresponsive, in most cases for the stated reason that records were not available from which this information could be ascertained.(2)

A total of 31 plaintiffs filed Answers to Interrogatory 1(m) which were both precise and responsive. However, in several individual cases, the Answers filed were not complete for all the years for which information was requested. In the following list, those trucking firms which filed incomplete Answers are designated by asterisks.

The following list consists of the number of violations reported by each plaintiff to have taken place within Pennsylvania subsequent to January 1, 1949. All the listed items represent violations of the Pennsylvania weight laws, except for some 24 miscellaneous violations. In addition to those listed, a relatively insignificant number of other miscellaneous violations was reported.

*Akers Motor Lines, Inc. (1953 only)—8 violations
D. F. Bast—56 violations
A. W. Bauman, Jr. Trucking Company—1 violation
G. C. Braden Trucking Company—2 violations
Cooper-Jarrett, Inc.—509 violations
William F. Crossett, Inc.—29 violations
Davidson Transfer and Storage Company—90 violations
C. W. Dillie—5 violations
Fischbach Trucking Company—31 violations
Fowler & Williams, Inc.—54 violations
*Friedman's Express, Inc. (not including 1949)—30 violations

(2) Following are the nine plaintiffs who failed to file exact or responsive Answers to Interrogatory 1(m):

Chadderton Trucking
Daily Motor Express
Eastern Freight-Ways, Inc.
Lombard Bros., Incorporated
McLean Trucking Company
Martin Brothers
McCullough Transfer Co.
Pennsylvania Transfer Company
York Transportation Co.

Hall's Motor Transit Company—73 violations
Edward G. Horn Trucking Company—8 violations
Karn's Transfer, Inc.—137 violations
Keystone Lawrence Transfer & Storage Company—2 violations
*Kramer Brothers Freight Lines, Inc. (not incl. 1949)—596 violations
Lansdale Transfer Co., Inc.—1 violation
F. W. Lusk Transfer Company—no violations
W. J. McCormick Truck Transportation—no violations
Martsolf Bros.—no violations
Miller Motor Express, Inc.—no violations
*Mushroom Transportation Company (1952 only)—349 violations
Lester C. Newton—4 violations
Noerr Motor Freight, Inc.—16 violations
Rodgers Motor Lines, Inc.—163 violations
Seaboard Tank Lines, Inc.—295 violations
*Spector Motor Service, Inc. (1952 only)—538 violations
Suwak Trucking Company—38 violations
W. I. Womeldorf & Sons Company—6 violations
Yale Transport Corporation—no violations
T. M. Zimmerman Company—17 violations

The grand total of violations reported, with the qualifications set forth above, is 3,058, of which approximately 3,034 were violations of the weight laws.

Only a few of the plaintiffs reported the specific weights for which overweight fines were paid. The largest reported overweight was 29,000 pounds by Mushroom Transportation Company on September 3, 1952. The Company paid a fine of $53.50 for this occurrence.

**EXHIBIT D-677.**

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NOTES FOR DISCUSSION

PUBLIC RELATIONS PROGRAM

21 MAY 1952

(CONFIDENTIAL)

GENERAL CONSIDERATIONS

The enclosed notes represent an outline for a program and the thinking behind it; projects are not developed in detail, nor is the timing nor the priorities final. The program will be developed and continuously adjusted in the light of actual events and experience.

Examination of the record of the previous activities, and discussions with the principals who participated, leads to the conviction that the previous program was well planned and executed and failed only because of the force of an unanticipated attack by the "Concealed Opposition." In consequence, it is believed that the measures necessary to counter the "grass roots" activities of that opposition, much of it of lasting consequence; and particularly the effects of those activities upon the Governor and his subsequent veto of the bill, and the consequent importance of countering these influences upon the Governor personally, far outweigh in present importance the main lines of activities of the previous program.

Determining the actual influences upon the Governor's decision, and countering them; effectively stopping further extension of opposition measures; and eliminating the opposition advantages already gained—these represent major emphasis.

The program here, as it is developed, will encompass four simultaneous lines:

1. The Governor's past, present and future attitude.

2. The aggressive coping with opposition measures past, present and future.

3. The preparation and routing of the bill, itself and support therefore.

4. A constructive program to build sound and lasting public support for the cause.

1. The Governor's Attitude: This is fundamental. If the Governor is willing to give (a) open support or (b) even informal oral support, the basic problem is relatively much simpler than if (c) he will give no indication or (d) will oppose re-passage, or passage of a modified bill to meet specifics in veto message.

If Governor is "neutral", re-passage will be definitely much more difficult than it would be under conditions (a) and (b) above.

ACTION INDICATED:

(1) It is of the utmost importance that we ascertain the *reasons or motives* for the Governor's veto.
At present the evidence leads to a wide range of conjecture. It is possible (a) that he acted out of purely conscientious convictions based upon the preponderance of evidence adduced at the hearing; or (b) that whatever his personal convictions might have been he acted from practical political considerations based on indications of a substantial, organized "grass roots" protest against the bill adduced at the hearing; or (c) that for this same reason Duff urged him, directly or indirectly to veto the bill. (Both (b) and (c) suppose that national convention strategy primarily dictated the move—to conserve internal state powers which might be jeopardized by a strong issue split.)

Without prejudice in advance to the Governor's motives, it would seem prudent to take cognizance of two

unconfirmed rumors which attained considerable currency (d) that a rumor perhaps assiduously spread by the "Concealed Opposition" had it that an attorney of prominence, prior to the veto known to have been personally close to the Governor, received two payments of $50 thousands each for obtaining passage, and was to have received another $50 thousands payment after the Governor signed the bill. It seems to be the fact that these two old friends became bitter enemies immediately after the Governor's veto. (Our friends inform us that the rumor was baseless, but that a member of the same firm did represent the association in connection with the bill, at an indicated total fee of less than one-third that mentioned in the rumors, and that for straightforward representation and not directly or indirectly for "influence"). It will be seen therefore, that we must take into consideration the inference that the Governor might have been primarily activated by the false rumor—either because (d.1) his old friend did not share the profits; or (d.2) more probably that he felt that his signing the bill might have been considered proof of the rumor. Finally, it is a fact that there were repeated and fantastic representations made to our friends that the Governor wanted various sums of money for various purposes as a consideration for signing the bill, and in view of charges which had been made against the Governor's background (involve rackets in his community) these various representations were politely listened to, or not acted upon. Whether or not the Governor personally knew of these representations, it would seem prudent to assume the possibility (e) that the Governor vetoed the bill as the result of the failure of our friends to act on these peculiar suggestions. (Some of the contacts were melodramatic—meetings at night in a dark hall in the Capitol, changing taxis to rendezvous, talking through a high hedge, (etc.). There seems to be no doubt some

But something happened. The Eastern Railroads entered a legal objection to say that if Miller was permitted to charge this low rate to the farmer for a part load of fertilizer THE RAILROADS WOULD HAVE TO LOWER THEIR RATES FOR CARRYING FERTILIZER, NOT ONLY IN THIS AREA, BUT TO AND FROM MANY OTHER POINTS.

The dominating power in Eastern Railroads in the Pennsylvania area is the Pennsylvania Railroad. The Eastern Railroads for this purpose is a lobbying organization, *serving the interests of the Pennsylvania Railroad.*

Now remember how the Pennsylvania Railroad feels about the Pennsylvania farmer: the railroad is scared to death it may have to lower fertilizer rates. This clearly establishes, on the Federal records, its basic feelings.

Now what is the 20,000- pound—16,000-pound business? Pennsylvania has a mixed up hodge-podge of regulations the effect of which is to make it hard to operate motor trucks at a fair profit. Who gains from this hodge-podge? The Pennsylvania Railroad. It can keep up its high freight rates against the Pennsylvania farmer, business man and consumer, *if it can keep the truckmen from operating efficiently.*

It is plain common sense that if it costs the truckman more to operate, the higher cost will be passed on to the user—in the case of fertilizer, the farmer. Likewise, it stands to reason that more efficient laws, permitting less costly truck operation, will tend to save the farmer and other users money, not only in truck charges, but also from the *lower rail freight rates* which would have to follow.

The truckmen developed the "Fair Truck Bill" after long study and consultation. It would permit more efficient and therefore *cheaper* trucking operation in Pennsylvania. It also would help National Defense, increase highway safety, and increase fines for overloading.

The Legislature passed the Fair Truck Bill last year.

This was a terrible blow to the Pennsylvania Railroad—to have the Pennsylvania Legislature, the sovereign power

(Continued on Next Page)

## OLD DOC BYOIR "P. M. M."

(Patent Medicine Man)

Carl Byoir, in addition to defeating the public will in legislation was partner in patent medicine operations, to one Julius Tuvin, who agreed to a cease and desist order from the Federal Trade Commission concerning false patent medicine claims.

Selling "Nerve Force" medicine, an elixir for the insides, a tonic to grow hair, and a reducing compound defined as a "humbug" by American Medical Association, taught him how to fool the public. Old Doc Byoir "is no babe in the woods," wrote U. S. Circuit Court of Appeals Judge Minton in affirming Byoir's guilt and a $5,000 Federal fine for conspiring to restrain and monopolize trade.

# HOW THE PENNSYLVANIA RAILROAD PREYS ON FARMERS

(Continued from Preceding Page)

of the Commonwealth, pass a law that by making efficient trucking possible, would lower the cost of fertilizer to farmers and thus force the Pennsylvania Railroad to lower the high charges it levies upon the businessmen, consumers and farmers of the State.

(The Pennsylvania Railroad is used to soaking the citizens of Pennsylvania—for it has managed, without specific exemptive laws, to avoid paying taxes in Pennsylvania that it pays in other states.)

What to do? How could the railroad defeat the Legislature's "Fair Truck Law"?

Well, it would be necessary to stir up some outcry from the Grange and from other organizations *supposed to represent the farmer's interest.*

But if the Pennsylvania Railroad got the Grange to help maintain high rates for fertilizer against the farmer, that would be deceiving the Grange, wouldn't it?

Who could they get to deceive the Grange?

Who indeed but Carl Byoir Associates. (Carl Byoir is a real old time patent medicine man.) Your Congressman can tell you about Congressional Investigations of Byoir and his undercover men, involving allegations of the use of prostitutes, huge amounts of liquor, and huger amounts of good hard money. But always the same pattern—hundreds of thousands of dollars used in slush funds to deceive worthy organizations to defeat the public will.

So Pennsylvania Railroad, the dominant interest in Eastern Railroads, had Eastern Railroads hire Byoir.

Byoir carpetbaggers descended upon Harrisburg and moved into the offices of the Grange and other organizations supposed to protect the citizens. They had orders to "kill the Fair Truck Bill at any cost" and plenty of money to do it with. The whole shocking story will come out in due time but just now we are talking only about the Grange.

Remember, the Pennsylvania Railroad wants to charge the farmers of Pennsylvania MORE for fertilizer. Remember that the intent of the Fair Truck Bill was to lower costs to farmers. Remember that the Grange has always been a fine, honorable organization representing the farmer.

Well, C. Colburn Hardy, a paid Byoir agent, and therefore a paid agent of the Pennsylvania Railroad, quietly moved in to the state Grange office at Harrisburg and took over the campaign.

Hardy's brains and the Pennsylvania Railroad's money —just how much of a huge slush fund only a Congressional investigation can find out—and suddenly there were great

(Continued on Next Page)

Exhibit D-61

## WILL YOU LET THE PENNSY GET AWAY WITH IT?

FILL IN, TEAR OUT, AND MAIL FOR FURTHER INFORMATION

Name .....

Address .....

*Without obligating myself in any way, I will do what I can as a good citizen to see that the Pennsylvania Railroad stops its undercover campaign against a better highway system and better use of existing highways.*

Signed .....

*Pennsylvania Motor Truck Association, Telegraph Building, Harrisburg, Pa.*

**OUR MOTTO: BETTER USE OF HIGHWAYS = LOWER SHIPPING COSTS**

**THIS PAMPHLET PREPARED AND DISTRIBUTED IN THE INTERESTS OF HONEST GOVERNMENT**



Exhibit D-61

236b

of the suggestions did emanate from individuals close to the Governor.

(2)—The Governor's motives for the veto and his present attitudes being ascertained, our entire program should be corrected accordingly, viewing this situation as possibly the most important of all problems.

(3)—In any event, a new bill should be drafted which would eliminate by avoidance unnecessary opposition resulting from the specific objections raised by the Governor in his veto message.

2. The "Concealed Opposition". A careful reading of the record of the past campaign, and conversations with the principals who worked with unusual skill and thoroughness and that the program's ultimate defeat by veto arose primarily from vigorous activitles of the "Concealed Opposition". This effect of this campaign may be summarized as follows:

Whether or not it directly caused the Governor to veto the bill, it did beyond question furnish him with the evidence of "grass roots" objection.

This objection in at least three important groups carries over and must be effectively countered to ensure passage, of the desired legislation.

The "Concealed Opposition" may be expected to be continued even more vigorously in the forthcoming period, and to be increasingly effective (since it will begin this time from a well advanced and entrenched position)—unless it is effectively countered.

ACTION INDICATED:

(1) Direct action to counter the "Concealed Opposition". An ideal program would contemplate action which would result in their "surrender" at the earliest possible time, without publicity; or, that failing, public

attack from two different directions only in a second period: or, that also failing to end the activities complained of, full public attack of a continuing nature in the third period. It goes without saying that a simple promise to stop similar activities in the future should be considered insufficient; it should be accompanied by definite and controlled assistance in undoing past harmful activities and any commitments as to our future abstention from publicizing these conspiratorial activities should be contingent on execution of their promises.

WARNING: Our friends in the past have stressed the concealed and subversive manner of these activities of the "Concealed Opposition"; therefore, since we may have to "come into court with clean hands" we should avoid duplicating their activities. We should not establish any "phoney" organizations, because if we do, we negate our past and future arguments criticizing them on that basis. All attacks should come from named individuals or groups whose bona fides cannot be questioned. Likewise, we must beware of falling into a deliberate trap by being exceedingly careful of all factual material used. Finally, we should take no action which to an unbiased citizen would not instantly be a simple act of defense by honest men against dishonest acts of an underhanded nature. The possible minor gains from activities of questionable nature would seem to be far outweighed by the danger to the whole program inherent under the circumstances if at any time we placed ourselves or our clients in a vulnerable position.

(2) Indirect action and direct action to counter the misuse of the enormous grass roots potential of the 4,000 township highway supervisors, whose leader aroused them against the bill for unknown motives. There can be no doubt of the influence and prestige of this leader-

ship, not the importance of the group. Two lines are indicated (a) one of personal contact with the leadership; and (b) the direct contact with individual members (a costly job) via pamphlet showing how truck fees help them and their roads directly. (This does not appear to be enough, and other lines of possible action should be devised here.)

(3) Indirect and direct action to counter the extensive activities of the "Concealed Opposition" with the Grange. The indirect activity should concern itself primarily with the leadership, both to ascertain the strength of its involvement with the opposition, and also to persuade them to cooperate. Direct action suggested:

(1) A pamphlet for mailing to individual farmers based on the PRR intervention against the farm interest in the fertilizer case. This is a classic exposition of the real interest of the "Concealed Opposition"—to make the farmer pay more for his fertilizer; something any farmer should remember all his life.

(2) A prize essay contest for 4-Hers, thru high schools, on "what the motor truck industry does for today's farmers in Pennsylvania." The advantage of this is that every contest will receive extensive help from his parents who will help him digest the background material.

(4) Indirect and direct action to counter the effective use by the "Concealed Opposition" of the Keystone and AAA motor clubs in the state. Indirect action to ascertain and deal with the reasons for the leadership's permitting the use of these organizations to do the opposition's dirty work. Direct action as follows:

In each of the two organizations (Keystone Motor is a big one outside AAA) a contest to select Out-

standing Safe Truck Driver of the Month—for an outstanding act of heroism, ingenuity, or courtesy furthering highway safety (an extension of clients' present activity in this direction). Winning driver gets a big enough prize to make all truck drivers try to be popular. Motorist club member who nominates winning driver gets a free set of new tires (enough to make most motorists willing to try). Motorist club member must read literature to qualify. We borrow motor club's mailing list for direct mailing—open only to members.

We help to organize a *legitimate* and *permanent* organization, the Motorists Safety League, which has the basic function of arranging continuous liaison between truck operators and *private car owners*, primarily through clubs and associations but also with individuals of both groups (including farmers):

In order to get better highways

For safer and more comfortable use of highways for all

*And to oppose vigorously open or concealed enemies of better highways and better highway transportation*

This organization will do the polite education and the heavy slugging against lying opposition (if necessary) among farmer truck owners, and private motorists, as well as among non-members of PMTA. Qualified farm and private motorists are entitled to emergency help from truck drivers.

3. The Joint State Government Commission: This is another consequence of the Governor's veto. He, in effect, has asked this Commission for a general recommendation.

ACTION INDICATED:

Appointment as quickly as possible, possibly by the proposed Motorist Safety League, of an impressive Committee to make a suitable report, and the presentation of this report and accompanying brief to the Commission for its guidance.

WARNING: An adverse or inadequate report might be very harmful to the program; default might permit the opposition to "write" the report. On the other hand, our record in this connection should be open and aboveboard.

4. A revised text of the bill. This would appear to be an urgent necessity; high in priority. Our clients know the internal and external compromises that were necessary. The language of the Governor's veto message contains what would seem to be unmistakable obstacles to be overcome, perhaps by simple wording rather than by substantive change. (For example, TR has suggestion of basing a simple formula on limits for front, single, and tandem axles, which can be added up by any user just so they stay within total limits for types—such a formula, if internally acceptable, would have the advantage of escaping a double talk type of criticism indicated in the veto message). It is important to fix a popular title such as "Fair Truck Bill", before opposition can revive "Big Truck Bill". It is suggested the bill have definite values for (a) farm truck owners and (b) private motorists, if possible.

5. The Legislature: Obviously last year's methods worked. This year, however, there are some added difficulties, including principally present interest in the national campaign, some doubt caused by the "Concealed Opposition's" effective campaigns amongst Highway Supervisors, Grange, and the two Motor Clubs, and the lasting and perhaps swelling "grass roots" reaction; and, finally the Governor's opposition. Some of the legislators, perhaps a sufficient num-

ber to prevent passage, would be reluctant to try it again without specific assurance form the Governor. If that assurance is not forthcoming, much more detailed contact work with individual legislators, and much greater "grass roots" work will be required.

ACTION INDICATED: Informative mailings, and perhaps some aggressive mailings containing disclosures on the opposition activities, *should circumstances indicate the desirability,* up to 1 August. After 1 August, letter pollings, personal contacts and indicated local and statewide assistance. After openings of session, continuous contacts of individual members and Committees as indicated, together with supporting publicity as indicated through all three phases.

6. An organized newspaper, wire and feature service, magazine and organizational bulletin publicity campaign, with collateral radio and television programs. This would be supplemented by specific statements and "leaks" as desired to assist individual legislators working on the bill.

7. A sponsored series of local programs to lay the foundations for local business and organizational support as might be required during session.

8. An explorations of possible union cooperations and utilization thereof.

This involves primarily:

1. Utilization of AFL Teamsters support through their media channels, and active community support by drivers, locals, etc.

2. A neutralization, if possible, of strong CIO opposition.

3. A neutralization, if possible, of UMW opposition.

9. Liaison and use of all other appropriate agencies—such as oil companies and manufacturing companies, chambers of commerce, etc.

TENTATIVE TIME TABLE OF OPERATIONS

PRESENT TO AUGUST FIRST:

1. Try to ascertain Governor's veto motives and present attitude. Adjust program in light of findings.

2. Launch complete investigation of "Concealed Opposition", obtaining evidence of past year's subversive activities. In form which can be published without libel danger is possible. Concentrate on real estate holdings (valuations) and real taxes paid by one railroad in Pennsylvania as example. Information should be gathered in form usable later in court if necessary.

3. Prepare immediate four-page mailer pamphlet (with cartoon) primarily for state farmers, also for legislators, high-lighting the fertilizer case. *Why* the Railroads Used the Grange: To Increase the Price the Farmer Pays for Fertilizer. But *why* did the Grange permit itself to help the railroads gouge the farmer! (This has the beauty of being in terms clear and unforgettable for any farmer.)

4. Immediate work on the selection of an advisory committee to work on Commission advisory report. (Should the advisory committee be retained by PMTA or by Penna. Motorists Safety League.)

5. Immediate shaping up and launching of the 4-H club essay contest.

6. Immediate shaping up and launching of the dual (one for each Motor Club) Outstanding Safe Truck Driver of the Month plans.

7. Immediate launching of informal contest activities in re Grange and the two Motor Clubs.

8. Further discussion over possible means of reaching and educating the 4,000 township highway supervisors as to the duplicity practised upon them.

9. Revision of the bill draft to conform with Governor's objections if possible (at least semantically) and to include features attractive to farm truck owners and to private motorists, if possible.

10. Immediate organization of the Motorists Safety League with private motorists, farm truck owners, traveling salesmen, as well as truck operators eligible. Any farmer who is a member of the Grange, (or PMTA) or any member of either Motor Club, who qualifies (by reading the literature and signing a pledge to cooperate for highway comfort and safety, can carry a card and display an emblem entitling him to emergency courtesies from truckers, including a night signal.

11. Special attention immediately to Maryland Highway Test as a continuing publicity and technical problem which should be constructively dealt with, rather than defensively.

12. Initial informative mailing to legislative candidates. Possible aggressive mailings—such as the fertilizer pamphlet. Continuation of personal contacts.

13. Establishment and beginning of statewide press activity; constructively informative during this period, with possibly some aggressive blows, such as fertilizer story.

14. Immediate canvassing of statewide radio and television possibilities for later use.

15. Initial exploration of other media—national magazines, house organs, advertisements, organizational publications, etc., primarily for Fall publications.

16. Planning of community activities for the two later periods.

17. Initial exploration of union contacts and activities.

18. Initial exploration of corporation and organizational support possible for later use.

19. Planning and launching program for 90-day test certificates for truck-weighing scales.

20. Civilian defense demonstrations as part of constructive program to increase esteem of truckmen.

AUGUST FIRST TO OPENING OF LEGISLATURE:

21. Stepping up of investigation of "Concealed Opposition". Possible launching of tax-payers' suit and other activities.

22. Actual beginning of 2 Motor clubs, Grange and 4H activities; also Township Supervisors, (if plan approved).

23. Specific contacts with legislators on help, etc. canvassing activities, informative mailings; the dope on the "Concealed Opposition" (if necessary).

24. Publicizing of revised bill, its advantages to specific groups in the State. Strong activities by Penna. Motorists Safety League.

25. Final estimate of Governor's attitude, and according revision of legislative program. Publicity in and out of legislature relative to Governor's promise to approve if re-passed.

OPENING OF LEGISLATURE ON:

26. Effort to obtain early passage in case re-passage over the veto is required.

27. Full publicity campaign supporting the bill. (Including the key organizations—2 motor clubs, Grange and highway Township supervisors).

28. If necessary, full and aggressive publicity regarding "Concealed Opposition", including tax-payers suits, hearings . . . , possibly U S Congressional investigation.

29. Maximum timed use of supporting groups, organizations, unions, community activities, etc.

30. If possible, obtain pledge from Governor in re his action after passage of legislation, and publicize it.

AFTER PASSAGE:

31. Follow through with Governor by personal contacts.

32. Support legislation by publicity program.

33. Be prepared for "heavy artillery" activity if "Concealed Opposition" tries to repeat performance of phoney and staged agitation against bill.

The above is not intended to be a complete program, but a tentative timetable for oral discussion among principals, to be corrected, augmented, or altered on the basis of the conversation. Many obvious lines of activity suggested either by the record or by conversations with principals have not been mentioned.

ALLOCATION OF THE FEES OF ALLIED PUBLIC RELATI

| DESCRIPTION | MAY TO DECEMBER 1952 | JANUARY TO JUNE 1953 | JULY TO DECEMBER 1953 | JANUARY TO JUNE 1954 | I |
|---|---|---|---|---|---|
| Allied Fee | 24,000.00 | 18,000.00 | 18,000.00 | 18,000.00 | |
| Allied Disbursements | 43,504.92 | 95,842.95 | 47,421.75 | 12,251.23 | |
| Allied Total Fee and Disbursements | 67,504.92 | 113,842.95 | 65,421.75 | 30,251.23 | |
| (1) Investigating the activities of the defendants in order to prepare and execute Allied's public relations program for PMTA. | 10,000.00 | 1,500.00 | | | |
| (2) Preparing and distributing the Grange pamphlet (D-61) and attempting to counteract the position of the Pennsylvania Stage Grange, under the leadership of Messrs. Mahood and Dimit, with reference to truck weights and taxes culminating in the activities of Deitrick at the Grange convention held in October 1952, including the ensuing publicity concerning the so-called "Grange split." | 7,500.00 | | | | |
| (3) Preparing and distributing the tax manual (D-641) and the tax manual law supplement (D-655), visiting Pennsylvania officials to stimulate assessment and taxation of railroad property, promoting taxpayers' suits to compel assessment of railroad property, organizing a field force of local truckers and industries to advocate the taxation of railroad property at the local level, and obtaining support for trucker-sponsored legislation for taxation of railroads in the 1953 session of the General Assembly | 7,500.00 | 15,000.00 | | | |

AND DISBURSEMENTS
ONS ASSOCIATES, INC.

| JULY TO ECEMBER 1954 | JANUARY TO JUNE 1955 | JULY TO DECEMBER 1955 | JANUARY TO JUNE 1956 | JULY TO DECEMBER 1956 | JANUARY TO JUNE 1957 | JULY TO AUGUST 1957 | TOTAL |
|---|---|---|---|---|---|---|---|
| 18,000.00 | 18,000.00 | 14,333.32 | 12,499.98 | 12,499.98 | 12,499.98 | 4,166.66 | 169,999.92 |
| 12,675.07 | 12,239.15 | 3,119.84 | 767.20 | 5,822.43 | 1,343.16 | — | 234,987.70 |
| 30,675.07 | 30,239.15 | 17,453.16 | 13,267.18 | 18,322.41 | 13,843.14 | 4,166.66 | 404,987.62 |
| | | | | | | | 11,500.00 |
| | | | | | | | 7,500.00 |
| | | | | | | | 22,500.00 |
| | | | | | | | 2,500.00 |
| | | | | | | | 7,250.00 |
| 5,000.00 | | | | | | | 15,650.00 |
| | | | | | | | 5,000.00 |
| | 1,500.00 | 5,000.00 | 7,000.00 | 2,500.00 | | | 47,000.00 |

| DESCRIPTION | MAY TO DECEMBER 1952 | JANUARY TO JUNE 1953 | JULY TO DECEMBER 1953 | JANUARY TO JUNE 1954 | JULY TO DECEMBER 1954 | JANUARY TO JUNE 1955 | JULY TO DECEMBER 1955 | JANUARY TO JUNE 1956 | JULY TO DECEMBER 1956 | JANUARY TO JUNE 1957 | JULY TO AUGUST 1957 | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| (9) Visiting newspapers, radio and television stations in Pennsylvania. | 1,500.00 | 9,000.00 | ?,000.00 | | | | | | | | | 12,500.00 |
| (10) Contacts with national magazines, newspapers, etc. | 2,000.00 | 2,000.00 | | | 500.00 | 500.00 | | 500.00 | | | | 5,000.00 |
| (11) Preparing advertising concerning railroad activities. | | 900.00 | | | | | | | | | | 900.00 |
| (12) Meetings with railroad and motor carrier executives to explore areas of common interest and cooperation between the railroad and trucking industries and negotiations looking to settlement of this lawsuit. | | | | | 5,000.00 | 5,000.00 | 5,000.00 | 2,500.00 | 4,750.00 | | | 22,250.00 |
| (13) Political research and maintaining contacts with and assisting PMTA members, truck suppliers, and shippers to maintain contacts with Governor Fine and members of the Pennsylvania General Assembly in the 1953 and 1955 sessions and with the executive and legislative branches of the federal government. | 3,000.00 | 6,500.00 | | | | 4,000.00 | | | | | | 13,500.00 |
| (14) Promoting good will for the trucking industry through activities such as: PMTA safety program; the story of the woman truck driver (Myrtle Still); the getting-out-the-vote campaign; the Pennsylvania state farm show; the polio truck pool; the Christmas truck pool; distribution of the motion picture film "Knights of the Highway"; expansion of the PMTA speakers' bureau; contacts with civic and service organizations; participation in "Pennsylvania Week" observance; and cooperation in civil defense program | 3,000.00 | 3,000.00 | 5,000.00 | 2,500.00 | 2,500.00 | 2,500.00 | | | | | | 18,500.00 |

## DEFENDANTS' REQUESTED FINDINGS OF FACT—PLAINTIFFS' CASE.*

### I. PARTIES AND JURISDICTION.

1. The plaintiffs are: Noerr Motor Freight, Inc.; Kramer Bros. Freight Lines, Inc.; McLean Trucking Company; Lansdale Transportation Company; T. M. Zimmerman Co.; Darl D. Womeldorf, an individual t/a W. J. Womeldorf & Sons Co.; Rodgers Motor Lines, Inc.; Akers Motor Lines, Inc.; Keystone Lawrence Transfer & Storage Co.; W. J. McCormick, an individual t/a W. J. McCormick Truck Transportation; Thomas W. Martin & W. Thayer Martin, partners t/a Martin Brothers; Julius Gardocky, an individual t/a Pennsylvania Transfer Company; Floyd W. Lusk, an individual t/a F. W. Lusk Transfer Company; The Davidson Transfer and Storage Company; Suwak Trucking Company; C. W. Dillie, an individual; A. W. Bauman, Jr., an individual t/a A. W. Bauman, Jr. Trucking Company; A. K. Martsolf, Clyde E. Martsolf, C. Harold Martsolf and Lester H. Martsolf, partners t/a Martsolf Bros.; Spector Motor Service, Inc.; G. C. Braden, an individual t/a G. C. Braden Trucking Company; Edward G. Horn, an individual t/a Edward G. Horn Trucking; Seaboard Tank Lines, Inc.; Friedman's Express, Inc.; Karn's Transfer, Inc.; Lombard Bros. Inc.; Lester C. Newton Trucking Company; Neil J. Bast and Karl Bast, partners t/a D. F. Bast; E. W. Chadderton, an individual t/a Ed Chadderton Trucking; Cooper Jarrett, Inc.; Eastern Freight-Ways, Inc.; Fowler & Williams, Inc.; William F. Crossett, Inc.; Fischbach Trucking Co.; Hall's Motor

* The rulings of the court below on defendants' requests are indicated at the end of each request. Where the court below struck words from the defendants' request, those words have a line drawn through them. Where the court below added words to the defendants' request, those words have been underlined.

Transit Company; Mushroom Transportation Company, Inc.; Miller Motor Express, Inc.; Yale Transport Corporation (Yale Rental Corporation); Daily Motor Express, Inc.; McCullough Transfer Co.; York Transportation Company, Inc.; and Pennsylvania Motor Truck Association (PMTA). Each plaintiff is a corporation, except where it is indicated that a plaintiff is an individual or a partnership. (Plaintiffs' Answers to Interrogatories filed on 2/17/53 by Pennsylvania Railroad) [*Affirmed*]

2. Plaintiffs, other than PMTA, operate trucks in Pennsylvania and in other states within the eastern part of the United States, and are engaged in the long-distance hauling of freight in interstate commerce in competition with railroad defendants. (Counterclaim, paragraph 3, at 60, 3952) [*Affirmed*]

3. Plaintiff PMTA is a Pennsylvania corporation, whose membership includes, among others, most of the plaintiffs. (Counterclaim, paragraph 4, at 60, 3952) [*Affirmed*]

4. The railroad defendants are: The Baltimore & Ohio Railroad Company; Boston & Maine Railroad; Canadian National Railway Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Central Railroad Company of Pennsylvania; The Chesapeake and Ohio Railway Company; Delaware & Hudson Railroad Corporation; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; The Lehigh and Hudson River Railway Company; Lehigh & New England Railroad Company; Lehigh Valley Railroad Company; Maine Central Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway; Norfolk & Western Railway Company; The Pennsylvania Railroad Company; Pittsburgh & West

| DESCRIPTION | MAY TO DECEMBER 1952 | JANUARY TO JUNE 1953 | JULY TO DECEMBER 1953 | JANUARY TO JUNE 1954 | JULY TO DECEMBER 1954 |
|---|---|---|---|---|---|
| (19) Counsel fees (Dawson, DeVarco, Hirsh). | 450.00 | 278.00 | 2,500.00 | | |
| (20) Preparation of photostats for use of sel, interviewing witnesses, and conferring trial counsel. | 2,500.00 | 8,000.00 | | | |
| (21) Management and planning functions not cated to any particular category, including ding by to defend against possible renewed road activity. | 7,404.92 | 4,664.95 | 39,921.75 | 21,251.23 | 14,175.07 |
| TOTAL | 67,504.92 | 113,842.95 | 65,421.75 | 30,251.23 | 30,675.07 |

| JULY TO DECEMBER 1954 | JANUARY TO JUNE 1955 | JULY TO DECEMBER 1955 | JANUARY TO JUNE 1956 | JULY. TO DECEMBER 1956 | JANUARY TO JUNE 1957 | JULY TO AUGUST 1957 | TOTAL |
|---|---|---|---|---|---|---|---|
| | | | | 3,000.00 | | | 6,228.00 |
| | | 500.00 | 2,500.00 | 2,250.00 | | | 15,750.00 |
| 14,175.07 | 10,239.15 | 3,453.16 | 767.18 | 72.41 | 9,843.14 | 4,166.66 | 120,959.62 |
| 30,675.07 | 30,239.15 | 17,453.16 | 13,267.18 | 18,322.41 | 13,843.14 | 4,166.66 | 404,987.62 |

| | | | | | |
|---|---|---|---|---|---|
| (4) Preparations for a nuisance pamphlet and program attempting to dramatize alleged deficiencies in railroad operation such as train wrecks, stream pollution, diseases spread by faulty sanitation equipment, etc. | 1,500.00 | 1,000.00 | | | |
| (5) Urging and preparing for an investigation of the U. S. Bureau of Public Roads by the Senate Appropriations Committee in connection with the Maryland Road Test. | 2,250.00 | 5,000.00 | | | |
| (6) Attempting to persuade Pennsylvania Labor leaders to support truck weight bills in the 1953 and 1955 sessions of the General Assembly, contacts with Teamster leaders, and attempts to enlist the support of the International Teamsters Union for the Allied program.<br><br>NOTES:<br>*This represents the Charnay-Bildersee trip to the International Teamsters Convention at Los Angeles, Cal. in October 1952.<br><br>**This includes $3,000 for the Charnay-Paynter trips to Miami in January - March, 1953. | 2,650.00* | 8,000.00** | | | |
| (7) Visiting farm leaders in preparation for PMTA-sponsored legislation introduced during the 1955 session of the General Assembly. | | | | | 5,00 |
| (8) Attendance of Allied representatives at depositions, pretrial hearings, and the trial and preparing or distributing press releases and other publicity material such as the Green affidavit (D-585). | | 22,500.00 | 8,000.00 | 500.00 | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| (15) Organizing and promoting the Pennsylvania Motor Safety League and its successor, the Citizens' Committee for Highway Safety. | 3,000.00 | 6,500.00 | 500.00 | | | | | 10,000.00 |
| (16) Meetings (other than PMTA's regular meetings) with truck operators, manufacturers and suppliers of the trucking industry at which Allied reported on its activities and the progress of this lawsuit and solicited funds and support for its program.<br>NOTE:<br>This includes $12,000 for the Charnay-Peynter trips to Miami in January - March, 1953. | 10,000.00 | 16,000.00 | 3,000.00 | 2,500.00 | | | | 31,500.00 |
| (17) Attending regular meetings of PMTA, its chapters, and its members. | 1,750.00 | 2,500.00 | 3,000.00 | 3,500.00 | 3,500.00 | 3,500.00 | 1,500.00 | 2,500.00 | 1,250.00 | 1,500.00 | | 24,500.00 |
| (18) Assisting PMTA in obtaining financial support and cooperation from ATA. | 1,500.00 | 1,500.00 | 1,500.00 | | | | | 4,500.00 |

Virginia Railway; The Reading Company; Western Maryland Railway; and Union Railroad Company.

The individual defendants are: Walter S. Franklin, a former president of The Pennsylvania Railroad Company; M. W. Clement, a former president of The Pennsylvania Railroad Company; R. W. Brown, a former president of The Reading Company; Joseph A. Fisher, president of The Reading Company; Charles J. Graham, president of Pittsburgh & West Virginia Railway; and Fred W. Okie, president of Union Railroad Company.

The other defendants are: Eastern Railroad Presidents Conference, and Carl Byoir & Associates, Inc. [*Affirmed*]

5. Railroad defendants operate in the area generally east of the Mississippi and north of the Potomac Rivers (hereafter called "Eastern Territory"), and are engaged in the transportation of passengers and the hauling of freight in interstate commerce. (Counterclaim, paragraph 1, at 59, 3951) [*Affirmed*]

6. Defendant ERPC is an unincorporated association having offices at 143 Liberty Street, New York, New York. Its membership consists in the main of the presidents or trustees of defendant railroads. (Counterclaim, paragraph 2, at 60, 3952) [*Affirmed*]

7. Defendant Carl Byoir & Associates, Inc., is a New York corporation, engaged in the business of public relations counsel with its principal office at 10 East 40th Street, New York, New York. (Complaint, paragraph 10, at 64) [*Affirmed*]

## II. THE CLIMATE OF COMPETITION—DEFENDANTS' LOSS OF BUSINESS TO PLAINTIFFS, THE HIGHWAY PROBLEMS, AND THE OBJECTIVES OF DEFENDANTS' PUBLIC RELATIONS PROGRAM.

8. In the United States as a whole, rail freight traffic in ton-miles for the year 1949 was 89% of rail freight traffic

in 1946; whereas truck traffic in 1949 was 154% of truck traffic in 1946. (D-199) [*Affirmed*]

9. In Eastern Territory, during the post-war period 1946-1949, the freight traffic of Class 1 railroads in revenue ton-miles declined 18% while that of Class 1 motor carriers increased 72%. (D-202, Behling 3983) The freight revenues of Class 1 railroads in this territory increased only 17% during this inflationary period, as compared to a 113% increase for Class 1 motor carriers. (D-203, Behling 3984) [*Affirmed*]

10. In the United States as a whole, in 1928, the railroads transported, in tons, 46.75% of the national production. In 1946, that proportion had declined to 38.36%, and by 1952, it had further declined to 31.37%. The relative loss of traffic by the railroads was greater in the six-year period, 1946 to 1952, than in the 18-year period, 1928 to 1946. Between 1947 and 1949, the annual decline was more severe than that found in any pre-war year. The reduction in the percentage of national production carried by rail was accounted for largely by diversion to other means of transport. Much of the diversion was to motor carriers, although other forms of transportation which compete with railroads had also increased their business. (D-205, Behling, 3992-4000, 4023-4025) [*Affirmed*]

11. Examples of traffic which was diverted from Eastern Territory railroads to motor carriers during the 1946 to 1949 period were candy, alcoholic beverages, canned goods, iron and steel articles, soda products, soap and cleaning compounds, malt liquors, glass containers, fertilizer materials, brass, bronze and copper articles, aluminum articles and window glass. (McMichael, 4081-4090; decisions cited in "Memorandum of Decisions of the Interstate Commerce Commission, etc." filed 1/22/57 at 5709-5714) [*Affirmed*]

12. The presidents of the eastern railroads recognized and were concerned about the decline in the railroads' share of the nation's transportation business in the period from 1946 to 1949 which they reasonably believed was resulting from the diversion of railroad traffic to other forms of transportation. (White, 842, 849; see evidence supporting counterclaimants' requests 9c to 23c) [*Affirmed*]

13. The railroads believed that traffic formerly carried by railroads was being carried by other forms of transportation because part of their costs were being paid by the motoring and general taxpaying public. In the railroads' opinion, barges, airlines, and heavy truck operators did not pay their proper share of the cost of constructing and operating the public facilities they used, such as waterways, airports, and highways. (P-199, p. 1; P-5, p. 3; P-24, p. 2; P-59, p. 2; Mackie, 1438-1439; White, 895-898, 933) [*Denied*]

14. The railroads have publicly stated since 1945 their belief that if each form of transportation paid all of its own costs there would be an economic distribution of traffic, and whichever form could do the best job at the lowest cost would move the freight. Sometimes the railroads would get the traffic; sometimes it would go to other forms of transportation. (White, 909; Mackie, 1440, 1438; P-250, Littlefield, 2110-2111) Since at least 1945, railroads have repeatedly and publicly stated their opposition to use of public facilities at less than cost by any form of transportation. (D-13, D-14, D-21 to D-23; Mackie, 1608-1622) [*Refused as stated*]

15. The railroads believed that an unfair competitive situation resulted from cost advantages enjoyed by other forms of transportation through use of facilities provided to them at public expense. This situation was created by the legislatures. The railroads themselves were powerless to correct it. Only the legislatures could remedy it, if they

chose to. The program of ERPC's Competitive Transportation Committee was aimed solely at supporting legislation to rectify what it believed to be unsound and unfair competitive conditions. (White, 907-909, 915-917; Mackie, 1439, 1645-1646; Swinehart, 107-108) [*Denied*]

16. The railroads believed that the most serious diversion of their business was to large trucks which, they believed, were not making payments adequate to cover their fair share of the cost of constructing and maintaining the highways on which they operated. Accordingly, ERPC's program was directed, primarily, at the competitive advantage which the railroads believed was being unfairly enjoyed by large trucks. By 1949, this highway issue had become a topical matter of growing public concern. (White 842-844, 849-851, 894-900; Degan, 1820-1821) [*Denied*]

17. The railroads had a substantial basis for their belief that the operators of heavy trucks were not paying, for their use of the highways, amounts commensurate with the highway maintenance cost incurred because of highway damage occasioned by large and overweight trucks and construction costs required to build highways capable of carrying heavy trucks. Numerous government-sponsored studies had arrived at this conclusion. (Littlefield, 2047-2050, 2122-2123, 2042-2046, 2081-2086, 2056-2057; Mackie, 1625-1626; D-29 to D-37; D-10; D-3; D-14; P-21, Swinehart, 232-251; see the Court's comment at 3385) [*Refused as stated*]

18. The railroads believed that for many years the trucking industry had engaged on a national basis in an organized campaign for higher truck weight limits and against higher truck taxes, the effect of which was to increase their cost advantage of operating on public rights-of-way. The railroads observed that between 1933 and 1950 the operators of heavy trucks had been successful in obtaining many liberalized size and weight laws, without substantial increases in license fees or truck taxes. (P-136, Franklin, 995, 996) [*Refused as stated*]

19. The railroads sought legislation to establish fair competitive conditions and did not intend to eliminate the trucking industry or any other industry as a competitor. (White, 900, 908-909, 929-933; Mackie, 1441-1442; Deegan, 1820, 1840) With respect to trucks, the railroads supported legislation to tax trucks in proportion to their use of highways, and opposed legislation that would increase the weight limits of trucks, since the railroads believed that the motorist and tax-paying public were paying more for the construction and maintenance of highways for heavy trucks than was necessary to meet the use and needs of the private motorist. (P-199, pp. 1, 4; Deegan, 1694-1695; White, 898-900, 908-909; Swinehart, 133, 154-155, 157-157a; P-5; P-24; P-136, Franklin, 995) [*Denied*]

20. The crystallization and mobilization of public opinion in support of such legislation was the object of defendants' extensive public information program. (White, 894-895, 915-917, 840; Deegan, 1671, 1678-1679, 1734, 1819-1820, 1840) [*Denied*]

21. Because the railroads' public relations personnel did not have the time that such a program required (Deegan, 1672; White, 845), they interviewed and considered proposals from several outstanding public relations firms (Deegan, 1698-1700, 1670-1689). [*Denied*]

22. Proposals were obtained from Byoir (P-3) and several other leading public relations firms (P-198, Deegan, 1784-1785; D-24, Deegan, 1805-1806; D-25, Deegan, 1806; D-26; White, 845). Byoir was retained as public relations counsel to put the projected railroad campaign into effect. (61-62; P-4) [*Affirmed as modified*]

23. Byoir was expected to accelerate the then-increasing public protest against the damage to highways caused by heavy trucks and against the inadequacy of the trucking industry's payments for their use of the highways (Girdler, 425; Swinehart, 158-161, 168-169, 173-179; White, 843, 911-

912; Littlefield, 2085-2086; Deegan, 1697a, 1734; see D-222) *[Denied]*

24. Byoir was expected to arouse the self-interest of the average citizen and interested groups, such as motorists' and taxpayers' organizations, by publicizing what the increased cost of the construction and maintenance of highways for heavy trucks means to the public and by distributing pertinent, authoritative, and factual data on the same subjects then being issued by state highway officials and people engaged in studies of the transportation problem. (Girdler, 420-421, 426-427; White, 898, 900-902, 904-908; P-199, pp. 3-4; P 59, p. 2, Hardy, 762) *[Denied]*

## III. THE THIRD-PARTY TECHNIQUE—DEFENDANTS' ENLISTMENT OF ALLIES.

25. For many accounts a public relations firm tries to get before the public as often as possible a favorable report; by name, of its client or its client's product, in order to gain wider public acceptance of the client or its product. For the ERPC account, however, Byoir was to distribute to the public information about the highway construction and maintenance required by big trucks and their payments for the use of those highways. (P-24, pp. 1-6) Public interest in the highway problem, not a product, was to be promoted. (Swinehart, 191, 230-231) *[Denied]*

26. Byoir had not been employed to stir up a truck-rail fight but to arouse the public's interest (Mackie, 1538; Girdler, 440-441; P-199, Deegan, 1691-1692) This could be done more effectively and greater acceptance of the ideas in which defendants believed could be achieved through non-attribution and the third-party technique. (Deegan, 1729). If publicity concerning the highway problem appeared to be only a part of a truck-rail fight, it would not have been newsworthy and the facts and arguments advanced would not have been evaluated on their merits. (Swinehart, 232;

Hardy, 757; Mackie, 1537-1538) In addition, broad press coverage at the local level could be accomplished only by encouraging individuals and groups in their own localities to express themselves on the subject. (Hardy, 756) [*Denied*]

27. Non-attribution and the third-party technique are not peculiar to Byoir and the railroads. They are techniques recognized by and customarily used in the public relations business and were recommended to the railroads by other well-known public relations firms. (Deegan, 1801-1802; P-198; D-25) The identical techniques were used by PMTA and its public relations agents to promote public and legislative acceptance of the trucking industry viewpoint, before, during, and after Byoir's activities in Pennsylvania. (See evidence supporting counterclaimants' requests 43c, 78c-162c) [*Refused as stated*]

28. The persons or organizations that Byoir assisted and to whom Byoir supplied information knew the identity of the persons with whom they dealt and the railroads' connection with them. (Swinehart, 177, 203-204; see evidence supporting defendants' request 43, below) There is no evidence that any person or organization ever subscribed to or expressed a view on any subject in which Byoir was interested that he or it did not actually hold. [*Denied*]

## IV. THE CLIMATE OF COMPETITION IN PENNSYLVANIA — PLAINTIFFS' LEGISLATIVE CAMPAIGN.

29. Commencing at least in 1941, PMTA embarked upon a continuing legislative program to increase the loads which trucks could carry legally in Pennsylvania. In each session from 1941 to 1955, it caused bills to be prepared and to be introduced in the Pennsylvania legislature which were intended to increase the permissible weight limits of trucks. Its bills were enacted in 1943, 1945 and 1955. Its 1941 and

1951 bills, which passed the legislature, were vetoed. (HB 690 of 1941, D-346; HB 634 of 1943, D-348; HB 614 of 1945, D-349; HB 1020 of 1947, D-351; HB 560 of 1949, D-352; SB 615 of 1951, D-353; HB 1390 of 1953, D-354; HB 1288 of 1955, D-356; Gogolin, 4505-4534; 5804) [*Affirmed*]

30. All of PMTA's truck weight bills were designed to improve the competitive position of the truckers (Gogolin, 4507, 4511-4512, 4519-4520), to enable the truckers to compete with the railroads ~~in the matter of rates,~~ and to take business away from the railroads (Noerr, 5463-5472). [*Affirmed as modified*]

31. In pursuing its legislative program PMTA, or its officers, prior to Byoir's activity in Pennsylvania, had encouraged its members to take an active part in party politics to aid in obtaining or defeating legislation (D-283 at 4354); had arranged a trucking industry contribution of $76,000, divided equally between the two parties (see evidence supporting counterclaimants' requests 36c-37c); had maintained special committees to establish contacts with Pennsylvania legislators at the county level and to urge support for PMTA's legislative program (Gormley, 4538-4542); and had maintained "live and continuous contact with legislators, candidates and State officials" (D-293 at 4370; D-295 at 4372; D-296 at 4373; D-297 at 4373). [*Affirmed*]

32. Prior to Byoir's activity in Pennsylvania, PMTA had maintained a public relations department or independent public relations counsel to assist in achieving its legislative goals. (Lebow, 4130, 4131; D-209 at 4099; D-210 at 4101; D-213 at 4112; D-214 at 4122; D-215 at 4123; D-219 at 4172; D-221 at 4176; D-260 at 4209; D-230 at 4238) PMTA has sought to achieve it legislative objectives by fighting its battle "on the public relations front". (D-549 at 5326) [*Affirmed*]

33. Defendants' activities in Pennsylvania in 1951 and 1953 were directed solely at resisting PMTA's efforts to

obtain passage of truck-weight bills which would have enabled the truckers to take further business away from the railroads. (See evidence supporting defendants' requests 34, 35, 74) [*Denied*]

## V. OPPOSITION TO PLAINTIFFS' 1951 LEGISLATIVE CAMPAIGN IN PENNSYLVANIA.

34. From immediately after PMTA caused the introduction of SB 615, it disseminated inaccurate and misleading publicity about it. Typical was its advertisement entitled "Six Big Reasons Why Senate Bill 615 Should Be Enacted", which was published in all the newspapers throughout the state and sent to every member of the House and Senate. (D-50; Reiter, 2292, 2259-2260) The inaccurate and misleading statements and implications related to increased axle loads (compare D-50 with D-111, p. 1, paragraph 1, at [illegible]04, and Buckius, 3850-3856, 3858); the adequacy of the fines (compare D-50 with P-282, p. 2 and Reiter, 2284, 2289-2291, 2293), the truck braking and engine requirements (compare D-50 with Reiter, 2293-2294), and the increase in truck license fees (compare D-50 with Reiter, 2283-2284, 2294-2295). [*Denied*]

35. Some of the opponents of the bill met to decide what should be done. Present were Joab K. Mahood, who was Executive Secretary of the Pennsylvania State Grange, H. A. Thomson, who was Secretary of the Pennsylvania State Association of Township Supervisors, Edward K. Hibshman, who was legislative representative of the Pennsylvania State Association of Boroughs, Young, who was a representative of the Pennsylvania Motor Federation (AAA), William A. Reiter, who was Chairman of the Associated Railroads of Pennsylvania, Harry Boyer, who was Chairman of the Pennsylvania CIO Council, and a representative of the League of Cities. (Reiter, 2298; Hibshman, 3021; Mahood, 2983; Thomson, 2911) There was discussion of how to oppose the bill. It was decided, among other

things, to get trained publicity personnel ~~who would be able to counteract PMTA publicity.~~ to assist that group in carrying out defendants' program already in operation. (Mahood, 2984, 2983; Reiter, 2299-2300) [*Affirmed as modified*]

36. The opposition of organizations opposing SB 615 was genuine, longstanding, and not inspired by Byoir or the railroads:

(*a*) The Pennsylvania Association of Second Class Township Supervisors had a real interest in the defeat of SB 615 and its opposition to that bill merely implemented its longstanding opposition to increased truck weights on Pennsylvania highways. The Township Supervisors were responsible for the construction and maintenance of 45,000 miles of highways and 10,000 bridges which would be adversely affected by increased truck weights. (Thomson, 2881, 2889; Reiter, 2301-2302; Hardy, 1251) At least since the adoption of a resolution in 1933 (Thomson, 2891-2892), the Township Supervisors had not only opposed an increase in truck weights but had urged the adoption of legislation reducing them (Thomson, 2891-2899, 2903).

(*b*) The Pennsylvania State Grange had a similar interest in the preservation of rural roads dating from at least 1910 and had opposed increased truck weights for many years. It had adopted resolutions opposing increased truck weights at its conventions in 1950 and 1951 and Beatty Dimit, its Master, had written editorials for the *Grange News* opposing increased truck weights and advocating a weight-distance tax before Byoir ever came into Pennsylvania. (Mahood, 2973-2980; Dimit, 3035-3037, 3046-3049).

(*c*) The automobile clubs had opposed increased truck weights from at least 1941. (Pennsylvania Motor Federation (AAA), Prowell, 2943-2951; Keystone Automobile Club, Dennison, 4783-4784)

(*d*) The interest of the Pennsylvania State Association of Boroughs in truck weights was similar to that of the Township Supervisors and its opposition to increased truck weights dated from at least July 1950. (Hibshman, 3015-3020) [*Denied*]

37. With the approval of the Associated Railroads of Pennsylvania, Reiter asked ERPC for a publicity man and Hardy, a Byoir employee, was sent to him. (Reiter, 2262-2264; P-125, at White, 860-861) Reiter introduced Hardy to the groups opposing the bill and made him available to them (Reiter, 2309; Thomson, 2914) [*Affirmed*]

38. Hardy was in Pennsylvania from late in June to early in August, 1951. (Hardy, 1107) During that period he worked principally with the Township Supervisors and the State Grange under the supervision of H. A. Thomson, who was Secretary of the Supervisors, Joab K. Mahood, who was Executive Secretary of the Grange, and Dr. Dimit, who was Master of the State Grange. (Hardy, 1112; Mahood, 2986; Thomson, 2914-2915) Hardy's principal role in his work for the Grange and the Supervisors was to supply facts and statistical information that the organizations wanted (Hardy, 1111-1112, 1179, 1195; Mahood, 2986; Dimit, 3050, 3051, 3052; Thomson, 2914); and to prepare releases for them or discuss the content of letters, or radio programs (Hardy, 1206, 1195, 1191, 1153-1154, 1177, 1179, 1188, 1193; Mahood, 2985, 2988, 2989-2990, 2992-2994; Thomson, 2915). Hardy also assisted these groups to distribute their material and, on occasion, paid some of the costs. (See, for examples: Mahood, 298 ; Hardy, 1198; Thomson, 2917-2918, 2925-2926; Hardy, 696-697, 1116, 1151, 1157) [*Denied*]

39. Hardy and other Byoir personnel provided the state and local auto clubs with information (Hardy, 1128-1129), helped them with newspaper releases (Hardy, 1129, 1158), or letters to their senators (Hardy, 1158, 1183-1184), or, if the club had already prepared or was collecting news

worthy material, Byoir put it in more dramatic form and provided for a broader distribution than it might otherwise have received (Hardy, 1156-1157). [*Affirmed*]

40. Hardy visited newspapers, explained SB 615 and its effects upon the public, presented expressions of local group opinion to the editors, and urged the editors to write editorials in opposition to the bill. Once, upon request, Hardy wrote an editorial. (Hardy, 1129-1130) The editor, of course, was free to accept or reject what Hardy brought him, in whole or in part, or to make whatever use of it that he thought proper. (Swinehart, 17 Hardy, 1329-1330) [*Refused as stated*]

41. Byoir also attempted, sometimes with success and sometimes without it, to obtain an expression of group and individual opinion about SB 615 from the CIO (Hardy, 1148-1149, Pennsylvania Chiefs of Police Association (Hardy, 1150-1151), Parent Teachers Association (Hardy, 1151), United Mine Workers (Hardy, 1178-1179, 1184-1185), Pennsylvania Economy League (Hardy, 1185-1186), and women's clubs (Hardy, 1124-1126, 1152, 1185). [*Refused as stated*]

42. Everyone who dealt with Hardy or other representatives of Byoir acting for the railroads knew who they were, what they were trying to do, why they were doing it, and who was paying them. (Hardy, 1132, 1212, 758-759, 1190; Thomson, 2923, 2939-2940; Mahood, 2985; Dimit, 3050-3051, 3063-3064, 3077-3078) [*Denied*]

43. The material disseminated by the defendants was factually accurate. (Hardy, 1213; Kohn, 5301; see also the Court's observation at 3385) This was a result of Byoir's careful and exhaustive research. (Swinehart, 170; Hardy, 538; Girdler, 417-418) [*Denied*]

44. Despite the activities of the defendants in opposition to the bill, it passed the legislature. [*Affirmed*]

45. After Hardy left Pennsylvania in August 1951, and prior to the Governor's hearing in January 1952, there was no Byoir representative working in Pennsylvania. (Hardy, 1073) The only activities in Pennsylvania in which Byoir was connected were the mailing of a reprint of a *Grange News* editorial, the supplying of information for Dr. Dimit's use in preparing another *Grange News* editorial, and the preparation of a news release to cover the latter editorial. (P-111; P-113; Hardy, 700-704, 727-728) [*Refused as stated*]

## VI. THE MARYLAND ROAD TEST.

46. In December 1949, representatives of the highway departments of several eastern states initiated the Maryland Road Test to obtain information which would allow them to determine whether state motor vehicle laws relating to size and weight were proper or should be amended. (Fairbank, 3114-3116) A committee, which included E. L. Schmidt, Secretary of the Pennsylvania Department of Highways, selected the test site, a highway near LaPlata, Maryland, which was similar in both pavement and subgrade to large mileages of highway in the eastern states. (Fairbank, 3118-3121; D-69, Major Finding 2, p. 7; D-69, pp. 59-61) The trucking industry was represented on the group which selected the test site; the railroads were not. (Fairbank, 3122-3123) [*Affirmed*]

47. The test was conducted by the Highway Research Board of the National Research Council on behalf of the highway departments of eleven eastern states, including Pennsylvania, and with the cooperation of the United States Bureau of Public Roads. (D-69, p. 5) The Highway Research Board organized an Advisory Committee, whose members included H. G. VanRiper of the Pennsylvania Department of Highways, John V. Lawrence of the American Trucking Associations, and Deputy Commissioner H. S. Fairbank of the U. S. Bureau of Public Roads. (Fairbank, 3125-3128; D-69, p. iv) [*Affirmed*]

48. The principal-purpose of the test was to determine the relative effects upon existing concrete pavements of four different axle loads: 18,000 pounds and 22,400 pounds on single axles; and 32,000 pounds and 44,800 pounds on tandem axles. Vehicles of each axle loading were operated over separate lanes and the effect of their passage was measured by the progressive pavement cracking. (D-69, pp. 5-6; Fairbank, 3128-3132). The test began in June 1950. In October 1950, the test was discontinued on the 44,800 pound tandem-axle lane because it was very badly damaged. The tests on the other lanes ended in December 1950. (Fairbank, 3135-3140) [*Affirmed*]

49. During the course of the test, a series of progress reports were sent to the members of the Advisory Committee and to the participating states. (Fairbank, 3143-3144). On January 9, 1952, the Highway Research Board sent a draft of "Summary of Major Findings" dated 1/9/52 (D-109, D-53) to the Advisory and Executive Committees, and to the highway departments of the participating states (which included Pennsylvania), the American Trucking Association, the War Department, the Petroleum Institute, the Automobile Manufacturers Association, the U. S. Bureau of Public Roads, and all other interests that were concerned and participating in the test. The Highway Research Board had prepared this draft ~~to be issued as a press release~~ for discussion at its annual meeting on January 14-18, 1952. (Fairbank, 3144-3146; P-267; Fairbank, 3149-3153) [*Affirmed as modified*]

50. Although it was thereafter determined that there should be no further distribution to the public of the draft of 1/9/52, there was never any restriction upon the use to be made by the participating states of any data concerning the test that they received from the Highway Research Board. (Fairbank, 3149-3153, 3331) [*Affirmed*]

51. Clinton Johnson, an independent public relations agent under contract with the Maryland State Roads Com-

mission, did not participate in the conduct of the Maryland Road Test or in the preparation of any of the official Highway Research Board reports concerning it, including the draft of 1/9/52. (Girdler, 453-455, 506, 364-365, 373-374; Fairbank, 3155-3156) [*Affirmed*]

52. The conclusions of the draft of 1/9/52 are substantially identical with the conclusions reached in the final report of the Maryland Road Test adopted on May 1, 1952. The differences are only in minor details and verbiage. (Fairbank, 3320; compare D-109 with D-69) [*Affirmed*]

53. The final report of the Maryland Road Test adopted on May 1, 1952, accurately recounts its findings and makes a comparison of the effects of the various axle loads on the test road. (D-69; Fairbank, 3158-3165) [*Affirmed*]

54. Among the significant major findings of the Maryland Road Test (D-69, pp. 7-11) are the following:

(*a*) "*Predominant Soil Type.* The predominant soil occurring on the test road was a silty clay of the A-6 soil group, which is typical of the soils underlying [an] extensive mileage of concrete pavement in this country." (Major Finding 2)

(*b*) "*Comparison of Effects of Single Axle Loads.* * * * Based on all types of subgrade * * * the 22,400 pound single axle loads caused 6.4 times as much cracking * * * as the 18,000 pound single axle loads * * *." (Major Finding 3)

(*c*) "*Comparison of Effects of Tandem Axle Loads.* * * * Based on all types of subgrade * * * the 44,800 pound tandem axle loads caused 12.3 times as much cracking * * * as the 32,000 pound tandem axle loads * * *." (Major Finding 4) [*Refused as stated*]

55. The Maryland Road Test was an objective test and was so treated and regarded by the Bureau of Public Roads. (Fairbank, 3168; see Laurie, 3646) [*Affirmed as modified*]

56. The Bureau of Public Roads made a motion picture fairly depicting the operation of the Maryland Road Test, its results, and the significance of those results. The narration was prepared by Fairbank. (Fairbank, 3165-3168, 3180-3181, D-71) [*Affirmed*]

57. With the Bureau's permission, Byoir purchased a copy of the film from the film manufacturing company selected by the Bureau. (Fairbank, 3178-3179, 3182-3183) [*Affirmed*]

58. The Bureau had intended to shorten the film and, when Byoir suggested the preparation of a short version that would omit a part of the explanatory portion of the film, the Bureau carefully reviewed Byoir's suggestion and instructed the film manufacturing company precisely what the second film should contain. It was so shortened and Byoir was then authorized to purchase it. The short version of the film does not in any way distort the significance and intent of the film as a whole. (Fairbank, 3183-3184, 3277; D-15; D-17 [*Denied*]

## VII. THE GOVERNOR'S HEARING AND THE VETO OF SB 615.

59. On January 17, 1952, Governor Kine, accompanied by Attorney-General Woodside, held a hearing to determine whether he should sign or veto SB 615. (3544) Prior thereto, invitations to or notices of the hearing were sent to those persons and organizations who had expressed their interest in the bill to the Governor. (3721-3722; Thomson, 2918; Mahood, 2990) The hearing was attended by at least 100 persons from 94 organizations. (3544-3769) [*Affirmed*]

### A. Opposition to SB 615.

60. Appearing at the hearing in opposition to approval of SB 615 were fifteen persons from fourteen organizations (including women's clubs, the automobile clubs, railroad

labor unions, the State CIO, the Pennsylvania State Grange, the Pennsylvania Association of Township Supervisors, and the Associated Railroads of Pennsylvania). Fourteen of these persons made oral statements (3545, 3549, 3553, 3554, 3560, 3566, 3576, 3577, 3578, 3684, 3685, 3720, 3725) and one of them submitted a written statement (D-52; 3545). [*Affirmed*]

61. A written statement was submitted by the Associated Railroads of Pennsylvania (3545; D-52) Byoir's only contacts concerning the hearing with any of the persons or organizations appearing there were made by Hardy, who came to Harrisburg the night before the hearing. He telephoned Thomson and Mahood to see if they planned to attend. (Hardy, 1094-1095) Both of them had made their own plans to attend before Hardy called them. (Thomson, 2918, 2930; Mahood, 2990; Dimit, 3054; Hardy, 1090, 1091) Just prior to the hearing, Thomson and Mahood told Hardy what they planned to tell the Governor and Hardy prepared summaries of their proposed statements for distribution to the press. (Hardy, 1086-1093, 733-735; Thomson, 2918-2919; Mahood, 2991-2992; P-118, P-119) Both of them prepared their own statements without assistance from Hardy or any other representative of the railroads (Hardy, 1086, 1090, 1091; Mahood, 2992). [*Denied*]

*B.* Support of SB 615.

62. Appearing at the hearing to urge approval of SB 615 were 85 persons from 80 organizations (including Teamsters' unions, the State AFL, PMTA and other trade associations, and the food, chemical, oil, steel, glass, automotive and manufacturing industries). Twenty-four of these persons made oral statements (3585, 3632, 3633, 3647, 3659, 3663, 3681, 3686, 3698, 3700, 3708, 3710, 3712, 3713, 3715, 3718, 3720, 3729, 3734, 3736, 3745, 3746, 3747) and ten of them submitted written statements (3655, 3656, 3681, 3718, 3631, 3632, 3680, 3717, 3741) [*Affirmed*]

63. PMTA organized and directed the presentation in support of SB 615 at Governor Fine's hearing by:

(*a*) Soliciting the appearance of at least thirty witnesses;

(*b*) Supplying air transportation for witnesses;

(*c*) Preparing seemingly independent statements and resolutions that were submitted by organizations not connected with the trucking industry;

(*d*) Preparing and issuing news releases covering statements made in support of the bill; and

(*e*) Soliciting letters and telegrams to be sent to Governor Fine in such a way as to disguise their PMTA origin and the real interest of the senders.

The presentation was so contrived that even PMTA's attorney who conducted the case in favor of the bill was not aware of the extent to which the witnesses had been mobilized by PMTA. PMTA regarded the presentation as a "commendable job" which made out a far better case for SB 615 than was offered against it. (see evidence supporting counterclaimants' requests 153c to 162c) [*Affirmed*]

### C. The Maryland Road Test.

64. At the hearing the Governor participated actively in a discussion of the Maryland Road Test with Gavin Laurie, a PMTA member (PMTA's Answer to Interrogatories 1(b) and 1(c) at 3954) and a proponent of the bill (3636) who was also a member of the Maryland Road Test Advisory Committee (3634, 3644; D-69, p. iv). Laurie told the Governor that the Maryland Road Test was a scientific and honest test (3646), that he agreed with the tentative findings of the test (3637), and that, pending the final report of the Maryland Road Test and the other road tests then underway (3638), he would not take any action on a decision affecting billions of dollars of highways (3646-3647). To-

ward the close of the hearing the Governor stated that he would consult the Pennsylvania Department of Highways about "the Maryland Road Test and some of the engineering features of this argument." (3768) [*Affirmed*]

65. It had been the practice of the Pennsylvania Highway Department to send promptly to the Governor copies of the Maryland Road Test reports (Schmidt, 3810-3811). Burggraf, Director of The Highway Research Board, sent the draft of 1/9/52 to the Planning Division of the Highway Department. The Planning Division received the report on January 10, 1952, and sent it to Secretary Schmidt on the same day. (D-109; Schmidt, 3809-3810) Schmidt sent it to the Governor, so that before the hearing he had that report (Schmidt, 3810-3811; see defendants' request 49) as well as a Maryland Road Test report entitled "Summary of Major Findings as Based on Stress and Deflection Tests" (compare D-110 with the Governor's statement at 3636A). [*Affirmed*]

*D.* The Position of the Pennsylvania Highway Department.

66. From at least 1939, and certainly long before Byoir came into Pennsylvania or was hired by ERPC, the Pennsylvania Department of Highways had expressed its opinion publicly (3797, 3800-3802) and to the Governor (3790, 3800-3802, 3831) and the legislature (3787) that existing legal truck weight limits were sufficiently high and in many cases higher than the roads could stand. (Schmidt, 3784-3807; D-113; D-100; D-99; D-112). [*Affirmed*]

67. Before the Governor's hearing, Schmidt, as Secretary of Highways, had given the Attorney-General a memorandum (D-111, Schmidt, 3803-3807) containing the Department of Highways' recommendation that SB 615 be vetoed because, consistent with the Maryland Road Test results (D-111 at Schmidt, 3805-3806), a high percentage of Penn-

sylvania highways having a relatively old age would have suffered definite damage when subjected to loads in excess of the AASHO limits of 18,000 pounds for a single axle and 32,000 pounds for tandem axles (D-111 at Schmidt, 3806-3807). The memorandum was based partly upon questionable statistics furnished the department by Marine of Byoir on behalf of the railroads. [*Affirmed as modified*]

## *E.* The Veto.

68. If enacted SB 615 would have, among other things:

(*a*) permitted a maximum axle load of 21,000 pounds (20,000 pounds plus 5% tolerance) without penalties—an increase of 1,000 pounds above the then-existing legal limit (D-111 at Schmidt, 3804; D-353, pp. 19, 21);

(*b*) increased the permissible gross weight limit without penalties for a tandem-axle semi-trailer combination to 63,000 pounds (60,000 pounds plus 5% tolerance) (D-353, pp. 18, 21) for a single-axle semi-trailer combination to 50,400 pounds (48,000 pounds plus 5% tolerance) (D-111 at Schmidt, 3804; D-353, pp. 17, 21); and

(*c*) increased the maximum gross weight limit without penalties of a four-wheel vehicle to 34,650 pounds (33,000 pounds plus 5% tolerance) (Class Z, D-353, pp. 13, 21), of a six-wheel vehicle to 49,350 pounds (47,000 pounds plus 5% tolerance) (Class ZZ, D-353, pp. 14, 21), and the permissible axle limit for the latter vehicle from 18,000 pounds to 21,000 pounds (20,000 pounds plus 5% tolerance) (D-353, pp. 18-19). These gross weights could not be obtained without exceeding the legal axle loads provided by the bill. (D-111 at Schmidt, 3805) [*Refused as stated*]

69. If SB 615 had been enacted it would have resulted in increased axle loads since it increased the permissible single-axle weight limit to 21,000 pounds and since it provided increases in gross-weight limits which, as a practical

matter, would necessarily have increased the actual axle-weights of vehicles passing over Pennsylvania highways. For large vehicles the increased single-axle and tandem-axle weights under the bill would have been substantially in excess of the 18,000-pound and 32,000-pound limits recommended by AASHO. The results of the Maryland Road Test, demonstrating the greater highway damage caused by heavier axle loads, were relevant to a consideration of SB 615 because its effect was to increase axle loads. [*Refused as stated*]

70. After the hearing, the Governor invited Secretary Schmidt to present orally his views on SB 615. (Schmidt, 3811) On January 21, 1952, Schmidt listened to the recording of the statements made at the Governor's hearing, and then argued for the veto of the bill, first with Attorney-General Woodside, Deputy Attorney-General Ryder, Chairman Evans of the Turnpike Commission, and the head of the State Police, and, thereafter, with the Governor. (Schmidt, 3212-3814) The Governor then asked Secretary Schmidt and Deputy Attorney-General Ryder to prepare a veto message (P-282) that he edited and signed a few minutes before midnight (Schmidt, 3815-3819; 67). [*Affirmed*]

71. Governor Fine vetoed SB 615 for the reasons set forth in his veto message (P-282):

(*a*) The Governor doubted that the trucking industry paid "its just share of the maintenance of our public highway system." (P-282, p. 2)

(b) Although "theoretically tandem axle loads [were] not increased by this bill," they actually would have been since "under the [then] presently existing permissible gross, it would be impossible, if the load were properly distributed, to obtain a load of 36,000 pounds on a tandem axle of a semi-trailer." (P-282, p. 1) Therefore, the Governor believed that the legisla-

ture should have the opportunity to consider the results of the Maryland Road Test, the tentative findings of which demonstrated the "possible destructive effects which * * * may result from the increase of permissible gross and axle loads." (P-282, p. 2)

(*c*) The trucking industry would not be severely handicapped by postponing passage of the bill since the tandem-axle weights it provided were lawful only in a very few states. (P-282, p. 2)

(*d*) The permissible gross weight of certain classes of motor vehicles could only be obtained by exceeding the permissible axle load. (Compare P-282, p. 2, with D-111 at Schmidt, 3805)

(*e*) The $25 fine for violation of the permissible axle load was inadequate. (P-282, p. 2)

(*f*) The fine for overloading on posted roads and bridges should have been, and was not, as high as the fines for overloading on primary roads. (P-282, p. 2) [*Refused as stated*]

72. There is no competent evidence that anything Byoir or the other defendants did or did not do caused the Governor's veto of SB 615. [*Denied*]

## VIII. PLAINTIFFS' "INJURY"—A CONSEQUENCE OF THE SOVEREIGN'S ACT.

73. The veto of SB 615 by Governor Fine represented the sovereign act of the Commonwealth of Pennsylvania, and caused no injury to the plaintiffs. [*Refused as stated*]

## IX. PLAINTIFFS' LEGISLATIVE CAMPAIGN IN PENNSYLVANIA IN 1953 AND DEFENDANTS' OPPOSITION THERETO.

74. In 1953 plaintiffs again conducted an extensive public relations campaign to promote passage of their bill.

(see evidence supporting counterclaimants' requests 28c, 29c, 49c, 50c, 55c, 67c, 84c, 87c, 88c, 92c, 94c) The railroads again opposed PMTA's program to increase truck-weight limits and Hardy came to Pennsylvania where his activity was similar to what it had been during the 1951 session. (Mackie, 1469-1471; Hardy, 747-748) There is no competent evidence that anything the defendants did or did not do caused the defeat of PMTA's 1953 truck-weight bill. [*Affirmed*]

## X. THE BYOIR MAGAZINE DEPARTMENT.

75. Byoir maintained a magazine department whose function, for the railroads, was the promotion of magazine articles discussing the highway construction and maintenance required by big trucks and their payments for the use of the highways. It carried on comprehensive research on these subjects and assembled scientific data, reports from specialized publications, newspaper clippings, and the results of interviews with experts such as personnel of the U. S. Bureau of Public Roads, the American Association of State Highway Officials, and the Highway Research Board. (Hartwell, 1375, 1377-1379) The extent of Byoir's assistance to writers and editors varied. On one occasion, with the full knowledge of the magazine, Byoir supplied a fully written article. (P-173; Hartwell, 1347) On a few other occasions, where an author was not sure that the idea would produce a saleable article, Byoir paid him for the time expended on research. (P-49, D-42; Hartwell, 1396-1398; Swinehart, 212) In most instances, Byoir did no more than supply research material to the author or magazine (D-39, P-172, D-43, D-44, D-48), or simply give the author access to its research library (P-200). There is no evidence that any of the articles so produced contained anything but truthful and accurate information. (See Hartwell, 1339-1367, 2152-2180, 2208-2210, 2226-2237; D-39, D-40, D-42 to D-45, D-48, P-49, P-171 to P-173, P-181, P-185, P-200) [*Denied*]

## XI. ACTIVITIES OF DEFENDANTS OUTSIDE PENNSYLVANIA.

76. The activities of defendants in states other than Pennsylvania had no material effect within Pennsylvania. [*Denied*]

77. There is no competent evidence that anything Byoir or the other defendants did or did not do caused enactment of the New York weight distance tax, New Jersey truck-weight restrictions, or any other legislation. [*Denied*]

78. Defendants advocated legislative relief in states other than Pennsylvania and used the third-party technique heretofore described (see defendants' requests 24-28) by cooperating with and assisting a number of groups and organizations. The evidence shows the following with respect to Byoir's cooperation with these groups:

(*a*) Empire State Transport League was formed in 1950 when a number of individuals indicated to a railroad representative their desire to cooperate with the railroads concerning the highway problem. (Girdler, 321-322) Through the assistance of Byoir they joined together as the Empire State Transport League and thereafter issued letters and press releases prepared by Byoir relating to the highway problem. The expenses of the organization were paid by defendants and the material it issued consisted entirely of reprints of articles, speeches or resolutions, and factual comments thereon. (P-30 to P-33, P-73, P-291, P-293, P-295A) There is no evidence that any of this material was factually inaccurate or misleading. It had no connection with Pennsylvania other than one mailing to the Pennsylvania Highway Department containing reprints of a New York State Grange resolution and an editorial from a Buffalo newspaper. (P-291, P-293, P-295A) This was long before Byoir came into Pennsylvania, and the accuracy of this material is attested by the fact that the Pennsylvania Highway Department compiled Pennsylvania

figures comparable to the New York figures in the Grange resolution, with similar results. (P-298)

(*b*) The New Jersey Citizens Tax Study Foundation was made up of many prominent citizens active in the civic affairs of that state who were concerned about its tax problems, including its highway problem. (Hardy, 596-603) One of its founding members was Hardy, a Byoir employee, and the defendants gave it financial support. (P-76 to P-78; Hardy, 802) The purpose of the organization was to publicize the Fifth Report of the New Jersey State Tax Policy Commission. (Hardy, 597, 804-805) This Report was an exhaustive survey of New Jersey's tax structure, a small portion of which dealt with highway user taxes. This aspect was not emphasized disproportionately in the publicity material of the New Jersey Citizens Tax Study Foundation. (D-3; Hardy, 807; P-79; see defendants' request 82) There is no evidence that any of its material was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania.

(*c*) The New Jersey Auto Owners, as its name implies, was a group representing the interest of private car owners in New Jersey's highway problem. Formed prior to World War II it became inactive during the war and was revived thereafter with the assistance of Byoir. (Hardy, 543) Its president was then the Chairman of the Roads Committee of a local community and therefore had a particular interest in the highway problem. (Hardy, 543, 811) Defendants gave the organization financial assistance and Byoir assisted in varying degrees in its publicity efforts, including press releases on local speeches by its officers and the preparation of pamphlets and articles. (P-59, P-64, P-66 to P-70, P-80 to P-87; Hardy, 548, 560-561, 565, 569-571, 573-576, 582-587, 611-618) There is no evidence that any of its material was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania.

(*d*) The Citizens Public Expenditure Survey was a New York state taxpayers group which had, therefore, a special interest in the highway finances of the state. In furtherance of this interest it sponsored an exhaustive study entitled "Highway Finances and Taxation in New York" which appeared early in 1930. (D-10) The study was prepared by Griffenhagen & Associates, a firm expert in the field of state and local taxation, which some years before had done a study of the highway taxation problem of Illinois. A railroad representative assisted the Citizens Public Expenditure Survey in making its arrangements with Griffenhagen for the study. (Girdler, 447; P-239; Littlefield, 2079-2080, 2144) Like many others, the study indicated that heavy trucks were not paying their fair share of highway costs. (see defendants' request 17; D-10) The Pennsylvania Railroad was a regular contributor to the Citizens Public Expenditure Survey, contributing $1,601 in 1950 (the year when the report was published), $2,666 in 1951 and $3,713 in 1952. (P-139 to P-141) There is no evidence that the Griffenhagen study, or any other material disseminated by Citizens Public Expenditure Survey, was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania.

(*e*) The Citizens Tax League was a taxpayers' group in the City of Rochester, New York. (Girdler, 443) It, therefore, had a specific interest in the subject of highway taxation and its executive director had pronounced views on the subject. (Girdler, 349) Byoir assisted it in the preparation of news releases and ERPC paid the expenses of the preparation and dissemination of some of its material, including releases and pamphlets containing involved statistical material. (P-39 to P-45; Girdler, 350-354) There is no evidence that any of this material was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania.

(*f*) The Save Our Highways Club was a group of railroad men in Tennessee interested in the railroads' position on highway taxation. (Girdler, 390; Hardy, 636) On occasion Byoir supplied this group with reprints of published material and paid for their dissemination. (Hardy, 636; P-96) The group had a number of members in Ohio and defendants arranged for its incorporation in that state, but the evidence is that it took no action there. (Hardy, 637; P-96B to P-96D) There is no evidence that any material disseminated by the group was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania.

(*g*) The Farm Roads Foundation was formed by an agricultural journalist and other agricultural leaders for the purpose of expressing the interest of farmers in the highway problem. (Bailey, 2366, 2368-2369, 2373, 2398-2399) In cooperation with the editors of *Country Gentlemen*, a publication of the Curtis Publishing Company, it sponsored the production and distribution in 1953 of a film called "Highways and Byways—USA". The interest of *Country Gentleman* in the project was stimulated by the large farmer response it had received from an article it had previously published on the subject and representatives of *Country Gentleman* participated actively in the production and editing of the film and script. (P-194; Bailey, 2378-2381, 2388, 2394) The film was contributed and its distribution was underwritten by the Western Association of Railroads and ERPC reimbursed the Western Association of Railroads for a portion of the cost thereof. (P-192A to P-192E; Bailey, 2377, 2398; Mackie, 1479-1482; Hutchinson, 1863-1864) On one occasion, Byoir made a few critical comments concerning the script of the film (P-191) but there is no evidence that the comments were adopted or that the defendants had anything else to do with the preparation of the film. The film itself is a fair dramatic representation of the special interest of farmers in the highway

problem. (P-271) The film was not distributed until 1953 and there is no evidence that it was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania. [*Denied*]

79. Byoir operates two services, one for the East and one for the Midwest, which distribute photographic mats free of charge to newspapers requesting them. The existence of these services is well-known in the newspaper industry and the mats themselves bear the address of Byoir's New York or Chicago office. (Hardy, 1079, 1235, 1238, 1327, 1328) On occasion Byoir made use of these services to disseminate publicity designed to focus public attention on the highway problem. (P-149 to P-152) On occasion Byoir employed SC Syndicate for the same purpose. As is well known in the industry, this syndicate, for a fee, will distribute mats and textual material free to newspapers, presented in such a way as to be appealing. (D-8; P-153; Hardy, 1077-1078) There is no evidence that any of the foregoing material was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania. [*Denied*]

80. In order further to focus attention on the highway problem, ERPC paid for two public opinion polls conducted by Princeton Research Service, a concern regularly engaged in this field much in the manner of the Gallup Poll or the Roper Poll. (Hardy, 816-817a). As a regular feature of its service, Princeton Research will, for a fee, poll public opinion on special subjects (Hardy, 818-819) and Byoir arranged for such special polls in New Jersey and in New York (Hardy, 822). The New Jersey poll was conducted in cooperation with the Citizens Highway Committee of Newark, New Jersey, which participated in the selection of the questions to be asked and, with Byoir's assistance, issued and disseminated a press release on the results. (Hardy, 624, 1057; P-94, P-90) In a similar fashion, the results of the New York poll were made avail-

able to and were publicized by Citizens Public Expenditure Survey. (Hardy, 1053; P-90, P-91, P-92) Again for the purpose of focusing public attention on the highway tax problem, Byoir retained Fact Finders Associates, Inc., to do a statistical study on the comparative tax rates of various industries, including the trucking industry and the railroad industry, and to publicize the results of its study. (P-105, P-106, P-107; Hardy, 678) Fact Finders has for a long time been engaged in providing such services for a fee, and is well-known for it. (Hardy, 1059, 677) There is no evidence that there was anything factually inaccurate or misleading in the poll results released by Citizens Public Expenditure Survey, The Citizens Highway Committee or the Fact Finders Study or that they had any impact or effect in Pennsylvania. [*Denied*]

81. Mrs. Bessie Q. Mott was a consultant in the field of women's interests who worked for Byoir on a regular monthly retainer. She was well-known in this field as a professional public relations consultant and was also vice-chairman of the American Home Department of the New York State Federation of Women's Clubs and chairman of its Public Affairs Department. (Swinehart, 121; P-14, P-16G). It was her function to interest women's groups in the subject of transportation and to assist in setting up women's club meetings on that subject. (Swinehart, 120-122; P-16G; P-16H) but the record does not disclose whether she was successful in this endeavor. Sometime after May 1952, Byoir helped to prepare and paid for a pamphlet published by Mrs. Mott entitled "Are We Being Railroaded Into Socialism?" which discussed many railroad problems, including incidentally the highway problem. (P-12; Girdler, 314-315) It was not published until the middle of 1952 and there is no evidence that it was factually inaccurate or misleading or that it had any impact or effect in Pennsylvania. [*Denied*]

82. The New Jersey State Tax Policy Commission was an official body set up by the New Jersey Legislature to

investigate and report on state fiscal matters. (D-3, pp. iii-iv; Hardy, 767, 785) It was headed by Dr. John F. Sly, a member of the faculty at Princeton University, who also heads a department of the university which does research work on local governmental problems. (Mackie, 1549-1550) In the Spring of 1950, the Commission issued its Fifth Report covering a variety of local tax problems, including the highway problem. As have surveys in many other states, the Fifth Report indicated that heavy trucks were not paying their fair share of highway costs and recommended a weight distance tax in New Jersey. (see defendants' request 17; D-3, p. 113; Mackie, 1661) In the Summer of 1949, a representative of the Associated Railroads of New Jersey, in preparing for his appearance before a committee of the United States Senate, became aware of a number of studies bearing on the highway problem which he called to Dr. Sly's attention. (Mackie, 1428, 1552, 1626) In December, 1949, counsel for the New Jersey Auto Owners made a statement for that group at a public hearing held by the Commission, copies of which were reproduced by Byoir. Byoir also prepared for him statistical material contained in supplementary data he submitted. P-85, P-86; Hardy, 615-617; Mackie, 1430) There is no evidence that any of this material was factually inaccurate or misleading, and plaintiffs failed to prove that the Fifth Report of the New Jersey State Tax Policy Commission was anything other than a sincere, unbiased and authoritative report on the subject to which it was addressed or that it had any impact or effect in Pennsylvania. [*Denied*]

## DEFENDANTS' REQUESTED CONCLUSIONS OF LAW—PLAINTIFFS' CASE.

I. The Sherman Act is inapplicable to defendants' activities in advocating and opposing legislation. [*Denied*]

II. Defendants' activities were reasonable and did not violate the Sherman Act. [*Denied*]

III. Defendants' rights of freedom of speech, press, assembly and petition preclude the application of the Sherman Act to the activities of the defendants about which plaintiffs complain.

IV. There is no competent evidence that defendants caused the veto of SB 615. [*Refused as stated*]

V. Since the veto of SB 615 was the official act of the Governor of Pennsylvania, this Court may not inquire into the reasons which induced the veto and, therefore, may not conclude that it was caused by defendants. [*Refused as stated*]

VI. Plaintiffs' claim for damages is limited to those resulting from the refusal of Governor Fine and the legislature to increase Pennsylvania's truck weight limits and such damages are not recoverable from the defendants. [*Denied*]

VII. There is no evidence that plaintiffs were, or will be, injured in their business or property, by anything defendants have done or are about to do. [*Denied*]

VIII. Plaintiffs unclean hands bar them from injunctive relief. [*Denied*]

IX. Defendants are entitled to judgment and to recover the costs of this suit. [*Denied*]

Respectfully submitted,

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APRIL 5, 1957.

## DEFENDANTS' REQUESTED FINDINGS OF FACT—COUNTERCLAIM.

### 1. PARTIES, JURISDICTION AND CONCERT OF ACTION.

1c. The counterclaimants are: The Baltimore & Ohio Railroad Company; Boston & Maine Railroad; The Central Railroad Company of New Jersey; Central Railroad Company of Pennsylvania; Delaware & Hudson Railroad Corporation; Erie Railroad Company; Lehigh & New England Railroad Company; Lehigh Valley Railroad Company; Maine Central Railroad Company; The New York Central Railroad Company; New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway; Norfolk & Western Railway Company; The Pennsylvania Railroad Company; The Reading Company; Western Maryland Railway; and Eastern Railroad Presidents Conference (ERPC). Each counterclaimant is a corporation except ERPC, which is an unincorporated association. [*Affirmed*]

2c. Counterclaimants, other than ERPC, are railroads which operate in the area generally east of the Mississippi and north of the Potomac Rivers (hereafter called "Eastern Territory"), and are engaged in the transportation of passengers and the hauling of freight in interstate commerce. (Counterclaim, paragraph 1, at 3951) [*Affirmed*]

3c. Counterclaimant ERPC is an unincorporated association having offices at 143 Liberty Street, New York, New York. Its membership consists in the main of the presidents or trustees of defendant railroads, including counterclaimants. (Counterclaim, paragraph 2, at 3952) [*Affirmed*]

4c. The plaintiffs against whom the counterclaim is brought are: Noerr Motor Freight, Inc.; Kramer Bros.

Freight Lines Inc.; McLean Trucking Company; Lansdale Transportation Company; T. M. Zimmerman Co.; Darl D. Womeldorf, an individual t/a W. I. Womeldorf & Sons Co.; Rodgers Motor Lines, Inc.; Akers Motor Lines, Inc.; Keystone-Lawrence Transfer & Storage Co.; W. J. McCormick, an individual t/a W. J. McCormick Truck Transportation; Thomas W. Martin & W. Thayer Martin, partners t/a Martin Brothers; Julius Gardocky, an individual t/a Pennsylvania Transfer Company; Floyd W. Lusk, an individual t/a F. W. Lusk Transfer Company; The Davidson Transfer and Storage Company; Suwak Trucking Company; C. W. Dillie, an individual; A. W. Bauman, Jr., an individual t/a A. W. Bauman, Jr. Trucking Company; A. K. Martsolf, Clyde E. Martsolf, C. Harold Martsolf and Lester H. Martsolf, partners t/a Martsolf Bros.; Spector Motor Service, Inc.; G. C. Braden, an individual t/a G. C. Braden Trucking Company; Edward G. Horn, an individual t/a Edward G. Horn Trucking; Seaboard Tank Lines, Inc.; Friedman's Express, Inc.; Karn's Transfer, Inc.; Lombard Bros. Inc.; Lester C. Newton Trucking Company; Neil J. Bast and Karl Bast, partners t/a D. F. Bast; E. W. Chadderton, an individual t/a Ed. Chadderton Trucking; Cooper-Jarrett, Inc.; Eastern Freight-Ways, Inc.; Fowler & Williams, Inc.; William F. Crossett, Inc.; Fischbach Trucking Co.; Hall's Motor Transit Company; Mushroom Transportation Company, Inc.; Miller Motor Express, Inc.; Yale Transport Corporation (Yale Rental Corporation); Daily Motor Express, Inc.; McCullough Transfer Co.; York Transportation Company, Inc.; and Pennsylvania Motor Truck Association (PMTA). Each plaintiff is a corporation, except where it is indicated that a plaintiff is an individual or a partnership. (Plaintiffs' Answers to Interrogatories filed on 2/17/53 by Pennsylvania Railroad) [*Affirmed*]

5c. Plaintiffs, other than PMTA, operate trucks in Pennsylvania and in other states within the eastern part of the United States, and are engaged in the long-distance

hauling of freight in interstate commerce in competition with counterclaimants. (Counterclaim, paragraph 3, at 3952) [*Affirmed*]

6c. Plaintiff PMTA is a Pennsylvania corporation, whose membership includes, among others, most of the plaintiffs. (Counterclaim, paragraph 4, at 3952) [*Affirmed*]

7c. PMTA was incorporated in Pennsylvania in 1928 (Complaint, paragraph 2, 3949-3950) to organize individual and county groups "* * * on state-wide basis as result of legislators' advice to present and sponsor unified program desired by trucking industry." (D-212 at 4103) An object of PMTA was "* * *to serve in securing needful laws and regulations; provide protection against unreasonable legislation." (D-198 at 3955-3956) [*Affirmed*]

8c. Most of the plaintiffs are members of PMTA and since 1949 all of the plaintiffs have supported the activities of PMTA by making contributions to the cost of such activities and none has objected to such activities. (Stipulation, paragraph 4, filed 5/17/56, Court Paper No. 460, at 3948-3949) [*Affirmed*]

## II. TRADE AND COMMERCE—TRENDS IN FREIGHT TRANSPORTATION.

**9c. Between 1936 and 1954 there was a marked increase in the use of heavy trucks in Eastern Territory and in the distance they travelled. This increase has been accompanied by a similar marked increase in the inter-city freight hauled by trucks as compared with that hauled by railroads. Both in the United States as a whole, and in Eastern Territory, the trend of increase of truck traffic since 1939 has been much more pronounced than the trend of increase in rail freight traffic. In Eastern Territory the freight traffic of Class 1 railroads in revenue ton miles has decreased materially while that of Class 1 motor carriers has increased**

**substantially. For the nation as a whole, and particularly in Eastern Territory, the freight revenues of Class 1 railroads since 1946 have lagged behind increases in the gross national product. On the other hand, freight revenues of Class 1 motor carriers have increased much more rapidly than both rail freight revenues and the gross national product. Substantial traffic has been diverted from rails to trucks because of rates reflecting a cost advantage enjoyed by motor carriers through their use of public rights-of-way.** (Counterclaimants' Requests 10c to 23c) [*Denied*]

10c. In 1954, in Eastern Territory, truck registrations were 184% of truck registrations in 1936. (D-95, D-95A at 3388) Between 1936 and 1954, the frequency of occurrence of heavy axle loads increased as follows:

| Axle Loads | 1936 | 1954 | Percentage of 1936 Total |
|---|---|---|---|
| 18,000 lbs. or more ..... | 34 per 1,000 | 120 per 1,000 | 353% |
| 20,000 lbs. or more ..... | 14 per 1,000 | 63 per 1,000 | 450% |
| 22,000 lbs. or more ..... | 6 per 1,000 | 31 per 1,000 | 517% |

(D-96, 96A at 3391-3392)

Travel in vehicle miles of trucks and truck combinations (which are primarily railroad-competitive tractors and semi-trailers) increased as follows:

| Type | 1936 | 1954 | Percentage of 1936 Total |
|---|---|---|---|
| All trucks and combinations | 5,810,000,000 | 14,040,000,000 | 242% |
| All single unit trucks ..... | 4,639,000,000 | 8,450,000,000 | 183% |
| Truck combinations ..... | 1,180,000,000 | 5,590,000,000 | 474% |

(D-97, D-97A at 3395-3397) [*Affirmed*]

11c. In 1950, in Pennsylvania truck registrations were 175.1% of truck registrations in 1936. They had increased from 277,000 to 485,000 (D-115 at p. 4, D-115A, D-116, at 3481-3483) [*Affirmed*]

12c. Between 1939 and 1955, the legal axle load and gross weight limits of trucks and combinations in Pennsylvania were increased as follows:

TWO-AXLE TRUCK OR TRUCK-TRACTOR

| Year | Front Axle | Rear Axle | Gross |
|---|---|---|---|
| 1939 | 18,000 lbs. | 18,000 lbs. | 26,000 lbs. |
| 1943 } 1945 } | 20,000 lbs. | 20,000 lbs. | 30,000 lbs. |
| 1955 | 22,400 lbs. | 22,400 lbs. | 33,000 lbs. |

THREE-AXLE TRUCK OR TRUCK-TRAILER

| Year | Front Axle | Rear Axles | Gross |
|---|---|---|---|
| 1939 | 8,000 lbs. | 16,500 lbs. ea. | 36,000 lbs. |
| 1943 } 1945 } | 8,000 lbs. | 18,000 lbs. ea. | 40,000 lbs. |
| 1955 | 22,400 lbs. | 18,000 lbs. ea. | 47,000 lbs. |

SINGLE AXLE SEMI-TRAILER

(Whether drawn by two or three axle truck-tractor, axle limits for truck-tractor as previously indicated.)

| Year | Trailer Axle | Gross Weight |
|---|---|---|
| 1939 | 18,000 lbs. | 39,000 lbs. |
| 1943 } 1945 } | 20,000 lbs. | 45,000 lbs. |
| 1955 | 22,400 lbs. | 50,000 lbs. |

TANDEM AXLE SEMI-TRAILER

(Whether drawn by two-axle or three-axle truck-tractor, axle limits for truck-tractor as previously indicated.)

| Year | Trailer Axles | Gross Weight |
|---|---|---|
| 1939 | 18,000 lbs. ea. | 39,000 lbs. |
| 1943 } 1945 } | 20,000 lbs. ea. | 45,000 lbs. |
| 1955 | 18,000 lbs. ea. | 60,000 lbs. |

From 1939 through 1955, it was always permissible to carry a gross vehicle weight of 62,000 pounds on combinations of a truck and full trailer at least one of which had three axles. (D-117) [*Affirmed*]

13c. In Pennsylvania, between 1941 and 1950, the registration of trucks in the 10 heaviest classifications increased by 131%. (D-115 at p. 5, D-115B; Myers, 3493-3494) [*Affirmed*]

14c. In Pennsylvania, between 1936 and 1950, the frequency of occurrence of axle loads of 18,000 pounds or over increased as follows:

| Type | 1936 | 1950 | Percentage of 1936 Total |
|---|---|---|---|
| All trucks and combinations | 2.1 per 100 | 13.2 per 100 | 628% |
| Semi-trailer combinations | 8.2 per 100 | 38.1 per 100 | 464% |

(D-115 at p. 11, D-118, D-118A, Myers, 3490-3493)

In 1936, of the loaded and empty semi-trailers weighed, 29.21% were over 30,000 pounds; and in 1950, 56.95% weighed over 30,000 pounds. (D-115 at p. 9 and table following) Between 1936 and 1950, the average gross weight of loaded semi-trailer combinations increased from 27,490 pounds to 37,000 pounds, an increase of 35%. (D-115 at p. 10; Myers, 3495-3496) [*Affirmed*]

15c. In the United States as a whole, rail freight traffic in ton miles for the year 1954 was 164% of rail freight traffic in 1939; whereas truck traffic in 1954 was 406% of truck traffic in 1939. (D-199) [*Affirmed*]

16c. In the United States as a whole, of the total ton miles of freight carried by rail and truck in 1939, 86.51% was carried by rail and 13.49% carried by truck. In 1954, 72.17% was carried by rail; whereas 27.83% was carried by trucks. Thus by 1954 the rail share had declined to 83% of its 1939 proportion and the truck share had increased to 206% of its 1939 proportion. (D-200, D-201) [*Affirmed*]

17c. In Eastern Territory in 1954, the traffic carried by Class 1 railroads in revenue ton miles was 79% of that carried in 1946; whereas the traffic in revenue ton miles carried by Class 1 motor carriers in 1954 was 255% of that carried in 1946. (D-202) [*Affirmed*]

18c. In Eastern Territory the freight revenues of Class 1 railroads in 1954 were 199% of such revenues in

1939; whereas the revenues of Class 1 motor carriers in 1954 were 774% of such revenues in 1939. (D-203) [*Affirmed*]

19c. Freight revenues of Class 1 motor carriers in Eastern Territory have risen much more rapidly than freight revenues of Class 1 railroads because the trucks carry the "cream traffic", *i.e.* traffic for which higher rates can be charged. Trucks receive about 6¢ for each ton mile carried by them while the railroads receive about 1.4¢. (Behling, 3986-3987) [*Denied*]

20c. In the United States as a whole, during the period 1939-1954, Class 1 railroad freight revenues have increased at a rate less than that of the gross national product. Relatively the freight revenues of Class 1 motor carriers have increased much more than the revenues of the railroads and the gross national product. The freight revenues of Class 1 railroads in Eastern Territory have increased at a rate less than that of the revenues of Class 1 railroads in the national as a whole. (D-204, Behling, 3987-3991) [*Affirmed*]

21c. In the United States as a whole, in 1928, the railroads transported, in tons, 46.75% of the national production. In 1946, that ratio had declined to 38.36%, and by 1952, it had further declined to 31.37%. The relative loss of traffic by the railroads was greater in the six-year period 1946 to 1952, than in the 18-year period, 1928 to 1946. Between 1947 and 1949, the annual decline was more severe than that found in any pre-war year. The reduced percentage of the national production carried by rail was accounted for largely by diversion to other means of transport, much of which was to motor carriers. (D-205, Behling, 3992-4090) [*Refused as stated*]

22c. Examples of the type of traffic which has been diverted from railroads to motor carriers are fresh fruit and vegetables (D-206 at 4000-4005), candy, alcoholic bever-

ages, canned goods, iron and steel articles, soda products, soap and cleaning compounds, malt liquors, glass containers, fertilizer materials, brass, bronze and copper articles, aluminum articles and window glass. Much of this traffic was diverted from rails to trucks because of the rates offered by motor carriers. (McMichael, 4081-4090; decisions cited in "Memorandum of Decisions of the Interstate Commerce Commission, etc." filed 1/22/57 at 5709-5714; D-206) [*Refused as stated*]

23c. A substantial factor enabling motor carriers to charge attractive rates is that motor carriers enjoy the cost advantage of operating on public rights-of-way. Railroads must build, improve, maintain and pay taxes on their rights-of-way. (Behling, 4005-4016) [*Denied*]

## III. PLAINTIFFS' PROGRAM AND ITS EXECUTION.

### A. Public Relations Effort to Attain Legislative Objectives.

**24c. Since at least 1943 PMTA has actively sought to attain legislative objectives through a broad-scale public relations program. The program was financed by special contributions from the trucking industry both within and without Pennsylvania, including $100,000 from American Trucking Associations, Inc. In 1953 alone PMTA spent over $350,000 on this effort. The cost of financing the present action was included in the above stated sums.** (Counterclaimants' Requests 25c to 29c) [*Affirmed as modified*]

25c. Since 1941 PMTA has employed public relations personnel, has maintained a public relations department, and has retained independent public relations counsel to assist it in achieving its legislative goals. (Lebow, 4130, 4131; D-209 at 4099; D-210 at 4101; D-213 at 4112; D-214 at 4122; D-215 at 4123; D-219 at 4172; D-221 at 4176; D-226 at 4209; D-239 at 4238) In May, 1950, PMTA announced that, since its problem was "obviously a legislative one", it in-

tended to achieve its legislative objectives by fighting its battle "on the public relations front". (D-549 at 5326) [*Affirmed*]

26c. PMTA's public relations program was financed by contributions to its Sustaining Membership Fund. (Gormley, 5377, 5378; D-225 at 4208; D-229 at 4211) [*Affirmed*]

27c. Allied Public Relations Associates, Inc., a New York public relations firm, was retained by PMTA in April, 1952, to handle its public relations. (Noerr, 5441-5444) [*Affirmed*]

28c. Since 1948 PMTA's public relations expenses have followed a rising trend. In 1952, its public relations expenses amounted to $175,389.01; in 1953, they amounted to $364,147.37. (D-566E at 5374; D-566F at 5376) To help meet its then-current fund-raising goal of $859,927, in the Fall and Winter of 1952-1953, PMTA held large meetings of truck operators in Baltimore, Washington, D. C., Charlotte, Richmond, Akron, Newark, New York and Philadelphia. (D-555 to 559 at 5350-5357; D-561 to D-564 at 5360-5365) The main purpose in the year 1952-1953 of solicitation of funds was to combat the railroad program against the truckers waged over the prior three year period. [*Affirmed as modified*]

29c. In August, 1952, PMTA applied to American Trucking Associations, Inc. for an allotment of $100,000 to help finance its public relations program. That sum was paid to PMTA in 1953. (D-570 at 5400; D-242 at 4247; D-571 to D-574; Atherton, 5403-5424; Gormley, 5425-5429) [*Affirmed*]

*B.* The Approach to the Legislature and Political Parties.

**30c. It was a basic part of plaintiffs' program to establish close liaison with members of the Pennsylvania legisla-**

ture, ~~to mete out rewards and punishments to them,~~ and to create and maintain a position of influence with the legislature in order to achieve PMTA's objectives. In 1950, 1952, and 1954, the trucking industry acting through Harry L. Gormley, Treasurer of PMTA, conducted active campaigns to raise money for both major political parties in Pennsylvania. Gormley delivered, or attempted to deliver, such money in approximately equal amounts to those parties. (Counterclaimants' Requests 31c to 39c) [*Affirmed as modified*]

31c. PMTA encouraged its members to take an active part in party politics to aid in obtaining or defeating legislation. (D-283 at 4354) [*Affirmed*]

32c. PMTA has maintained special committees to establish contacts with Pennsylvania legislators at the county level and to urge support for PMTA's legislative program. (Gormley, 4538-4542) [*Affirmed*]

33c. PMTA endeavored to maintain "live and continuous liaison with legislators, candidates and State officials". (D-293 at 4370; D-295 at 4372; D-296 at 4373; D-297 at 4373) [*Affirmed*]

34c. To accomplish its legislative objectives PMTA sought to mete out to legislators "rewards and punishments" dependent upon whether they had supported or opposed PMTA sponsored legislation. (D-318 at 447; D-320 to D-321 at 4449-4453; D-261 at 4311; D-323 at 4456; D-343 at 4500; D-357 at 4587-4601) [*Refused as stated*]

35c. PMTA maintained its liaison with legislators through direct personal contacts in Harrisburg by "legislative consultants" paid to assist in preparing bills and to influence legislation. Among its legislative consultants was Samuel B. Dennison, who had previously been a member of the Pennsylvania House of Representatives (1941 to 1951 sessions), and for a long time (1947 to 1951 sessions) had

been Chairman of the House Motor Vehicles Committee. (Dennison, 4751-4752, 4765-4766; D-357 at 4600) [*Affirmed*]

36c. So that the trucking industry would be "recognized" at the "State level", Harry L. Gormley, President of Keystone-Lawrence Transfer & Storage Company (a plaintiff), and Treasurer of PMTA, was designated in 1950, 1952 and 1954 by representatives of the trucking industry, including officers of PMTA, to handle on an industry-wide basis the collection of money for the Republican and Democratic parties in Pennsylvania. (Gormley, 4554, 4555, 4570-71, 4574, 4576, 4578, 4585) [*Affirmed*]

37c. In 1950 Gormley collected approximately $76,000 from 600 to 700 representatives of the trucking industry. In the presence of Edward Gogolin, General Manager of PMTA, Gormley delivered $37,000 to the Republican Party and $39,000 to the Democratic Party. (Gormley, 4557, 4560-4569) [*Affirmed*]

38c. In 1952, Gormley collected from representatives of the trucking industry approximately $35,000. Of this money, $19,000 was delivered to the Democratic Party, but the balance, $16,000, was not then delivered to the Republican Party. (Gormley, 4580, 4582-4583) [*Affirmed*]

39c. In 1954, Gormley collected from representatives of the trucking industry approximately $44,000. Of this, $30,000 was delivered to the Democratic Party, and the balance of $14,000, to which was added the $16,000 not previously delivered, was turned over to the Republican Party. These sums were delivered by Gormley in the presence of Floyd B. Noerr, President of PMTA. (Gormley, 4584-4586, 4587) [*Affirmed*]

C. Legislative Efforts To Divert Business From Counterclaimants.

(1) *Special Legislative Treatment for the Trucking Industry.*

**40c. Since as early as 1932, PMTA has sought to secure legislation that would permit plaintiffs to increase permissible truck weights and to defeat legislation that would increase truck fees and taxes, ~~thus enabling plaintiffs to divert business from counterclaimants.~~ In carrying out this program, PMTA organized support among trucking and non-trucking groups, concealed PMTA's role as the organizer of such activity, and prepared and introduced bills into the legislature.** (Counterclaimants' Requests 41c to 44c) [*Affirmed as modified*]

41c. Beginning as early as 1932, PMTA consistently opposed legislation to increase truck license fees, to impose taxes on trucks, and to make available for general revenue purposes license fees and gasoline taxes. (D-212) These efforts continued until at least 1953. PMTA claimed that it defeated a ton mile tax, defeated legislation to double or triple overload fines, defeated a boost in registration fees, removed the gross receipts tax law from the books, and obtained amendments to the wage and hour law regulations to exempt truck operators. (D-575, D-212) [*Affirmed*]

42c. Commencing in 1941, PMTA embarked upon a program to increase the loads which trucks could carry legally in Pennsylvania. To this end it caused to be prepared and to be introduced in the Pennsylvania legislature in 1941, 1943, 1945, 1947, 1949, 1951, 1953 and 1955, bills, each of which was intended to increase the permissible weight limits of trucks. (HB 690 of 1941, D-346; HB 634 of 1943, D-348; HB 614 of 1945, D-349; HB 1020 of 1947, D-351; HB 560 of 1949, D-352; SB 615 of 1951, D-353; HB 1390 of 1953, D-354; HB 1288 of 1955, D-356; Gogolin, 4505-4534; 5804) [*Affirmed*]

43c. In 1947, 1949, 1951, and 1953, PMTA sought to obtain enactment of bills to increase permissible truck weights limits by:

(*a*) having truckers write to and make personal contact with legislators;

(*1947:* D-247 to D-248 at 4257-4273; D-249 at 4276; D-250 at 4278; D-251 at 4280; D-252 at 4282; D-253 at 4285. *1949:* D-267 at 4325; D-269 at 4328; D-272 at 4331; D-273 at 4331 *1951:* D-305 at 4389; D-306 at 4391. *1953:* D-334 at 4477; D-336 at 4481.)

(*b*) having representatives of other industries write to and make personal contact with legislators without disclosure that such letters and personal contacts had been solicited by PMTA;

(*1947:* D-254 at 4297; D-255 at 4298; D-256 at 4300; D-257 at 4301; D-258 at 4301; D-259 at 4303. *1949:* D-267 at 4325; D-270 at 4329, D-271 at 4330; D-274 at 4332. *1951:* D-296 at 4372; D-302 at 4380; D-305 at 4389; D-307 at 4413. *1953:* D-329 at 4471; D-331 at 4473; D-332 at 4474; D-334 at 4477; D-335 at 478; D-337 at 4485; D-340 at 4496.)

(*c*) intentionally concealing from legislators and state officials the fact that the letter writing campaign had been organized by PMTA;

(*1947:* D-246 at 4253; D-252 at 4282. *1949:* D-266 at 4324; D-2 at 4325; D-269 at 4328; D-270 at 4329. *1951:* D-303 at 4381; D-304 at 4385; D-307 at 4413; D-312 at 4435.)

(*d*) preparing material for legislators to be used in speeches in the House of Representatives;

(*1949:* D-268 at 4327. *1951:* D-299 at 4377; D-300 at 4378; D-312 at 4435.) [*Affirmed*]

44c. PMTA's truck weight bills were designed to improve the competitive position of the truckers (Gogolin

507, 4511-4512, 4519-4520), to enable the truckers to compete with the railroads ~~in the matter of rates,~~ and to take business away from the railroads (Noerr 5463-5472). [*Affirmed as modified*]

(2) *Attempts to Eliminate Opposition to PMTA's Legislation.*

**45c. Since 1947 PMTA has tried to eliminate the opposition to its legislative program of organizations such as Pennsylvania State Grange, Pennsylvania State Association of Township Supervisors, and the railroads operating in Pennsylvania, by applying economic pressure on them, by spreading false propaganda about them, by fostering litigation attacking their leaders, and by attempting through falsehoods to discredit the Maryland Road Test, the Highway Research Board and the U. S. Bureau of Public Roads.** (Counterclaimants' Requests 46c to 50c) [*Denied*]

46c. After the Pennsylvania State Grange opposed the bills to increase truck weights introduced by PMTA in the Pennsylvania legislature in 1949 and 1951 (Mahood, 2973-2980; Dimit, 3035), PMTA prepared and published a false and misleading pamphlet about the relationship between the railroads, Byoir and the Grange, and concerning opposition to a trucker's ICC rate application. (Compare 961 with D-65, D-66, D-195, D-196, D-197, Fletcher, 3930-3946, and Dimit, 3062-3068) PMTA distributed 10,000 copies of this pamphlet to members of the Pennsylvania legislature, state, local and federal officials, Grange members, newspapers and radio stations, service organizations, and investment firms. (D-606 at 5513; D-607 at 5514; D-608 at 5515) [*Refused as stated*]

47c. When the Pennsylvania State Association of Township Supervisors opposed PMTA's 1949 truck weight bill, PMTA considered the institution of suit against the association for alleged misuse of Association funds but was advised by counsel that PMTA had no standing to sue.

(Thomson, 2906-2910; P-129, P-130; D-217 at 4168; D-218 at 4169; D-224 at 4204) Early in 1953, immediately after the Association had reaffirmed its opposition to increased truck weights (Thomson, 2898-2899), PMTA's public relations counsel, Allied Associates, arranged to provide attorneys with information to be used in a suit against H. A. Thomson, Secretary of the Association. (D-325, p. 1, paragraph 9) With PMTA collaboration, a suit for alleged misconduct was instituted against Thomson by several members of the Supervisors Association (*Hocker, et al. v. H. A. Thomson, Secretary of Pennsylvania State Association of Township Supervisors*, C. C. P. Dauphin County, In Equity, No. 2064, 2 D & C 2d 95). (4206, 4207) [*Refused as stated*]

48c. When the railroads operating in Pennsylvania opposed the bill to increase truck weights introduced by PMTA into the Pennsylvania legislature in 1947, PMTA urged that its members threaten to route freight over other lines unless such railroad opposition was withdrawn. (D-261 at 4309; D-263 at 4316) [*Affirmed*]

49c. In May 1953 PMTA paid Lewis Gilbert to appear at the stockholders' meeting of the Pennsylvania Railroad to question its management about railroad opposition to PMTA's truck weight legislation, and obtained news coverage highlighting Gilbert's questioning. PMTA circulated among financial writers and others, material adverse to the railroad industry for the purpose of making bankers "queasy" about railroad securities as investments. (D-607 at 5508; D-617 at 5530) [*Refused as stated*]

50c. After the railroads operating in Pennsylvania had opposed SB 615, and after the bill was vetoed by Governor Fine partly because of its "possible destructive effects * * * as demonstrated by the tentative findings of the Highway Research Board" based on the Maryland Road Test (P-282), PMTA publicized a series of false and misleading statements about the Maryland Road Test, the

Maryland Road Test films, and the railroads' alleged connection with them:

(*a*) On April 22, 1953, Floyd B. Noerr, President of PMTA, delivered to Governor Fine a letter falsely asserting that "The 'tenative findings of the Highway Research Board' * * * was a fraud from beginning to end, originated by paid railroad agents, using railroad money." (D-87 at 3245, with which compare Fairbank, 3245-3249 and Laurie, 3646; see also D-88)

(*b*) On April 24, 1953, PMTA issued a press release which falsely stated that:

> "* * * the Maryland Road test films had been drastically edited so as to show that trucks were a ruinous influence on highways, and 'phoney' Maryland Road Test report was cooked up by railroad agents and given to Governor Fine as an official document.
>
> * * *
>
> "The 'tentative findings' of the Highway Research Board * * * were 'fraud from beginning to end, originated by paid railroad agents using railroad money'."

(D-88 at 3248-3249, with which compare Fairbank, 3248-3249, and the fact that PMTA had in its files the "tentative findings" referred to marked "authentic HRB", D-84 at 5763)

(*c*) On May 13, 1952, Edward W. Chadderton, a PMTA member, wrote a letter to the Editor of the Pittsburgh Press falsely stating that "* * * the Maryland Road Test was a farce and proved nothing * * *". (D-90A, D-90B at 3252, with which compare Fairbank, 3252, 3253)

(*d*) On January 6, 1953, David Charnay, President of Allied, wrote to Tom Kennedy, an official of United Mine Workers, falsely saying that "* * * Maryland Road Test No. 1 * * * we are now prepared to prove, was not a valid test, was rigged to produce false results, and was a propaganda stunt by the railroads' public relations agency car-

ried out with the help of a bribed public official." (D-91 at 3253, with which compare Fairbank, 3254-3255)

(*e*) On April 13, 1953, Floyd B. Noerr, President of PMTA, sent a letter to Senator Styles Bridges, Chairman of the Senate Appropriations Committee, containing the following false statements:

"* * * I wish to enter a protest against appropriating funds for the U. S. Bureau of Public Roads to permit it to engage in a campaign to destroy the industry it presumably is supposed to foster both for commerce and for national defense.

"* * * the railroads are planning to spend something over half a million dollars to distribute an edited film putting the trucking industry in an odious light, and also to distribute a pamphlet accomplishing the same sinister purpose, *both with the connivance and approval of the Bureau.* We are reliably informed that, since that time, both purposes have been accomplished and that the U. S. Government, through the Bureau, is now represented in showings in many states as being devastatingly critical of the trucking industry.

* * * * * * *

"You will note the payment of railroad money through Messrs. Johnson, Cohen and others to corrupt public information relative to the subject matter of the same film.

"I respectfully request that you lay these matters before your honorable committee with a view to ending the participation of the U. S. Bureau of Public Roads in a conspiracy by the railroads to defame the trucking industry." (Emphasis by Noerr, D-74 at 3206, with which compare Fairbank, 3208)

(*f*) On May 15, 1953, Floyd B. Noerr, President of PMTA, sent a telegram to Senator Robert Taft containing the following false statements:

"* * * Also request you investigate Byoir's connection with the inexplicable efforts of U. S. Bureau of Public Roads to use tax money to foster circulation by the railroads, with U. S. Government seal of approval, of a vicious moving picture film of the Maryland Road Test designed to injury the highway transport industry and to mislead the Congress and the American public." (D-82A, D-82B at 3228, with which compare Fairbanks, 3229)

(*g*) PMTA published a booklet entitled "The Road Ahead" which falsely states:

"Investigating further, Allied discovered that the U. S. Bureau of Public Roads, a tax-supported federal agency supposedly working in the interest of highway transport, actually had engaged in agreements with the railroads to distribute a very unscientific, doctored film about the supposedly scientific test, with emotionally irritating unscientific pictures and dialogue, designed to turn the public and governmental bodies against the trucking industry." (D-89, p. 11, at 3250, with which compare, Fairbanks, 3250-3251) [*Refused as stated*]

(3) *Efforts to Increase Railroad Taxes.*

**51c. Since 1949 PMTA has attempted to increase railroad costs by imposing additional taxes upon railroad property. This program, which constituted a major part of PMTA's public relations activities and expenditures, was carried out by urging state and local investigation of taxes paid by railroads; by preparing and distributing more than 16,000 copies of the "Tax Manual" and the "Law Supplement" among legislators, public officials, press and radio, investment groups, labor unions, courts and law schools; by fomenting the institution of law suits to impose taxes upon railroad property; and by preparing and introducing into the Pennsylvania legislature bills providing for taxation of**

**railroad rights-of-way.** (Counterclaimants' Requests 58c to 58e) [*Denied*]

52c. Commencing in May 1949, PMTA undertook a program to impose additional state and local taxes upon railroads by the enactment of legislation and by the removal of existing local tax exemptions. In carrying out that program PMTA urged the sending of letters to editors (D-624 at 5581; D-625 at 5582), publicized the fact that in certain municipalities railroad property is exempt from local taxation (D-626 at 5584; D-627 at 5585; D-628 at 5586; D-629 at 5587), fomented local investigations of taxes paid by railroads (D-218 at 4171; D-277 at 4340), and considered suit against the railroads to compel disclosure of information regarding railroad taxes (D-630 at 5588). [*Refused as stated*]

53c. PMTA prepared a "Tax Manual" which advocated the imposition of additional taxes upon railroads operating in Pennsylvania. (D-641 at 5612; D-638 at 5599) PMTA thereafter paid an attorney $10,000 to prepare a "Law Supplement" to the "Tax Manual", to advise municipal officials regarding the assessment of taxes upon railroad property, to draft legislation imposing such taxes, and to prepare pleadings and appear in court in connection with taxpayers' suits for the collection of such taxes. (D-637 at 5596; D-654 at 5654) [*Refused as stated*]

54c. PMTA distributed copies of the "Tax Manual," 16,000 copies of the "Law Supplement," and similar material, among the following groups:

(*a*) Pennsylvania state legislators and Congressmen. (D-651 at 5646; D-244 at 4249)

(*b*) Pennsylvania municipal officers and school boards. (D-642 to D-644 at 5619-5620, 5623-5625; D-401A at 5622; D-651 at 5646; D-244 at 4249)

(*c*) ICC officials. (D-651 at 5646; D-244 at 4249)

(*d*) Pennsylvania courts and law schools. (D-651 at 5646; D-244 at 4249)

(*e*) Investment bankers, New York Stock Exchange members and financial writers. (D-633 to D-636 at 5591-5594; D-640 at 5611; D-651 at 5646; D-244 at 4249)

(*f*) Directors of Mack Truck, to be shown "to certain Wall Street connections." (D-650A at 5638)

(*g*) Pennsylvania C.I.O. Council. (D-376 at 4697)

(*h*) Pennsylvania newspapers and radio stations. (D-639 at 5604; D-651 at 5646; D-244 at 4249).

(*i*) Others.' (D-643 at 5622; D-645 at 5626; D-646 at 5629; D-650B to L at 5639-5645; D-651 at 5646; D-244 at 4249) [*Affirmed*]

55c. In 1952 and 1953 PMTA instigated numerous local investigations of tax assessments upon railroad properties (D-401A at 5621; D-645 at 5626; D-647 at 5631; D-648 at 5633; D-649 at 5636; D-652 at 5648; D-656 at 5663), and also fomented the institution of law suits to compel the imposition of additional taxes upon railroad property in many municipalities (D-401A at 5622; D-631 at 5589; D-645 at 5626; D-647 at 5632; D-652 at 5648; D-654 at 5656; D-656 at 5665; D-658 at 5668-5670; D-659 at 5671). [*Refused as stated*]

56c. PMTA mobilized a "field force" to work in municipalities to get all railroad property assessed; to commence mandamus proceedings against assessors refusing to comply; to publicize the amount of taxes which might be collected on exempt railroad property; to start legal actions to force payment of taxes by railroads on exempt property; to get municipalities to join together in such legal actions; to seek legislation removing exemptions on railroad real estate; and to generate letters and editorials to keep the railroad tax issue alive. (D-323 at 5678; D-661 at 5675; D-660 at 5674; D-662 at 5680) [*Refused as stated*]

57c. PMTA prepared, for introduction by Representative Bolton in the 1953 session of the legislature, HB 1387 and HB 1388, which provided for taxation of railroad rights-of-way; and PMTA urged municipal officials and other persons to write to their legislators in support of these bills. (D-665A at 5685; D-665B at 5686; D-664 at 5684; D-341 at 4497; D-342 at 4499; D-344 at 4502; Gogolin, 5689, 5690) This action was taken by the Plaintiffs after the discovery and expose of the railroad-Byoir campaign against the truckers. [*Affirmed as modified*]

58c. PMTA's efforts to impose additional taxes on railroad property were an important part of its legislative program. Both legal and public relations counsel for PMTA agreed that it was PMTA's "only chance for a favorable decision". Allied stated that "immediately after close of the [1953] legislature Allied employees on the account will be spending 90% of their time on this item and above 65% of all expenses". They recommended that the tax program should receive "much more emphasis than the trial or any other matter". (D-666 at 5686) [*Refused as stated*]

(4) *Efforts to Burden Railroad Operations.*

**59c. PMTA has prepared, and is ready to introduce into the Pennsylvania legislature, bills designed to increase railroad costs by requiring the railroads to purchase new equipment, to build new structures, and to increase maintenance, and has prepared publicity to support them. Typical are bills to patrol tracks and remove snow and ice from rails, to keep down weeds on rights-of-way, and to construct footwalks on bridges crossing streams.** (Counterclaimants' Requests 60c to 62c) [*Refused as stated*]

60c. Commencing in March of 1950, PMTA publicized train wrecks, railroads on public streets, and other "ways in which railroads annoy people", and prepared a "nuisance pamphlet" which included such additional subjects

as a list of diseases allegedly spread by railroads, and railroads' alleged contribution to stream pollution. PMTA also instigated complaints to the Pennsylvania Public Utility Commission concerning railroad grade crossings and grade crossing accidents. (D-589 at 5496; D-590 at 5497; D-591 at 5499; D-592 at 5500; D-593 at 5501; D-594 at 5502; D-595 at 5503; D-596 at 5504; D-597 at 5505; D-598 at 5505; D-599 at 5506; D-600 at 5507; D-602 at 5509; D-603 at 5510; D-604 at 5511; D-609 at 5517; D-610 at 5519; D-16 at 5528; D-658 at 5670) [*Refused as stated*]

61c. PMTA prepared, for introduction into the Pennsylvania legislature, bills requiring the railroads to pay taxes on overhead structures; to floodlight grade crossings; to pave walkways at railroad stations; to discontinue use of wooden railroad coaches and cabooses; to maintain passenger shelters at stations; to equip trainmen with electric lanterns; to inspect bridges and maintain watchmen thereon; to erect footwalks on trestles; to inspect toilet facilities in passenger stations; to construct footwalks on bridges crossing streams; to patrol tracks and remove snow and ice from rails; to keep down weeds on rights-of-way; to file annual reports on free transportation; to maintain automatic gates or watchmen at all grade crossings; and to maintain night reflector signs at approaches to all grade crossings. (D-612 at 5523; D-614 at 5525; D-611 at 5521; D-609 at 5517; D-231 at 4217) PMTA presently holds drafts of these bills and is ready to introduce them into the Pennsylvania legislature at some suitable time. (Gogolin, 5689, 5690) [*Refused as stated*]

62c. PMTA considered the introduction of legislation imposing personal property taxes upon railroad cars and eliminating failure to stop, look and listen as a defense in railroad crossing accident cases. (D-613 at 5524; D-615 at 5527) [*Refused as stated*]

(5) *Opposition to Recommendations of the Weeks' Report.*

**63c. PMTA, through its membership in ATA, is opposing greater freedom of rate adjustment for the railroads, as embodied in the Weeks' Report and the legislation implementing it.** (Counterclaimants' Requests 64c to 66c [*Refused as stated*]

64c. The recommendations of the Report dated April 15, 1955, prepared by the Presidential Advisory Committee on Transportation Policy and Organization (Weeks' Report) would relieve the railroad industry as common carriers from burdensome regulations and restrictions and would allow the railroads greater freedom to utilize their economic capabilities in the pricing of their transportation service. (D-669) [*Refused as stated*]

65c. The railroads of the United States, including counterclaimants, have actively supported the principal recommendations of the Weeks' Report and Federal legislation introduced to implement it. (5702-5707) [*Refused as stated*]

66c. Since the Spring of 1955, the trucking industry, under the leadership of ATA, of which plaintiff PMTA is a member, has undertaken to raise a "Survival Fund" of one million dollars, and is actively campaigning against the recommendations of, and legislation designed to implement, the Weeks' Report. (Lawrence, 5692-5701) [*Refused as stated*]

(6) *This Lawsuit.*

**67c. The present action was conceived, instituted, and financed by PMTA as a major part of its public relations program. The suit was designed as a lever to eliminate railroad opposition to PMTA's truck weight bills. It has been used as an instrument for the dissemination of false publicity, including false charges of bribery, to further the**

**passage of PMTA's truck weight bills by discrediting the railroads and the other opponents of those bills, and to attack the integrity and objectivity of the Maryland Road Test.** (Counterclaimants' Requests 68c to 76c; see also. Counterclaimants' Requests 50c and 88c) [*Denied*]

68c. Timed to coincide with the opening of the Pennsylvania legislature, this suit was instituted in January, 1953. [*Denied*]

69c. This suit, conceived as a public relations venture, has been financed out of PMTA's public relations funds. (D-566E at 5374; D-566F at 5375; D-560 at 5358; D-561 at 5360) [*Denied*]

70c. Of the public relations money spent by PMTA in 1952 and 1953, 21.65% was spent on this lawsuit; 9.25% was spent on PMTA's campaign to impose taxes on railroads; 8.51% was spent on investigations relating to the Maryland Road Test, railroad nuisances, hidden opposition to trucking, and U. S. Bureau of Public Roads; and only 2.59% was spent on "good will for trucking industry". (D-575 at 5430) [*Refused as stated*]

71c. Plaintiffs, in their Complaint and in their answers to interrogatories (Court Papers Nos. 191, 544), charged, among other things, that the railroads carried out their alleged campaign through the bribery and corruption of public officials and officials of independent organizations. These charges were false, and no evidence was produced by plaintiffs at the trial to support them. (See 2718) [*Refused as stated*]

72c. In February, 1953, after commencement of this suit, PMTA wrote letters to 70 of the biggest out-of-state motor carriers, calling on them for help "in alerting the press to watch for the headline news developments now unfolding in the trucking industry's $250,000,000 anti-trust suit against the railroads". (D-576 at 5477; also D-577 at 5480; D-578 at 5481) [*Affirmed*]

73c. In publicizing this lawsuit PMTA and Allied arranged for the issuance of a weekly trial report to PMTA members, and to trade and business magazines, and issued news releases concerning pre-trial depositions in this action. (D-580 at 5484; D-582 at 5486) [*Affirmed*]

74c. Allied sent telegrams to New York newspapers and wire services calling attention to depositions to be taken in this action, and used advertising pressure upon newspapers as a lever to obtain press coverage of depositions. (D-581 at 5485; D-581 at 5273) [*Refused as stated*]

75c. PMTA prepared and issued special editions of "Penntrux" and a brochure entitled "The Road Ahead", which reported on deposition testimony and documents. (D-583; D-584; D-89) [*Affirmed*]

76c. In May, 1953, PMTA printed and distributed 10,250 copies of "affidavit contra defendants' motions to dismiss for failure to state a claim on which relief can be granted", previously filed by plaintiffs in this proceeding in mimeographed form (Court Paper No. 200), and its public relations counsel proposed the distribution of an additional 30,000 copies (D-585 to D-588 at 5488-5494). [*Affirmed*]

## IV. THIRD PARTY AND OTHER PUBLIC RELATIONS TECHNIQUES USED BY PLAINTIFFS.

### A. Technique of Indirection.

77c. In pursuing its public relations campaign, PMTA endeavored to distract attention from consideration of its legislative program on the merits, by avoiding public hearings (D-264 at 4318, D-127 at 3861), by discrediting all "past and pending" road tests (D-494 at 5119), by avoiding frank and accurate discussion with the press, unless absolutely required (D-501 at 5206-5207), and by attacking all those who opposed its program in order to discredit

them rather than to meet their arguments (Counterclaimants' Requests 45c to 50c and 67c to 76c). [*Denied*]

*B.* Use of Labor Groups.

78c. Commencing in 1948, in order to advance its legislative objectives PMTA attempted to gain labor union support or neutralize labor union opposition through the following techniques.

(a) Concerted efforts to persuade union leaders;

(b) Paid advertising in union periodicals in exchange for the publication of material prepared by PMTA;

(c) Free publicity for friendly union leaders;

(d) Intra-union pressure upon uncooperative union leaders;

(e) Paid employment of an Ohio lobbyist and labor leader to make contact with labor unions;

(f) Dissemination to union leaders of false material concerning railroads; and

(g) Payment for entertainment and hotel rooms for union leaders from whom favors were sought. (Counterclaimants' Requests 80c to 94c) [*Refused as stated*]

79c. Through these techniques PMTA obtained labor support for its legislative program from the Teamsters, United Mine Workers, United Rubber Workers and United Steelworkers. When such support had been secured, it was PMTA's practice to "initiate the ideas", to compose and distribute telegrams, resolutions, and other printed matter attributed to the unions or their leaders, and to cause union leaders to make statements supporting PMTA's program to legislators and other influential persons, without disclosing that such telegrams, resolutions and statements had been composed or secured by PMTA. (Counterclaimants' Requests 80c to 94c) [*Refused as stated*]

(1) *AFL and Teamsters.*

80c. Commencing in 1948, PMTA actively solicited and received legislative and public relations support from local Teamsters unions in Pennsylvania. (D-358; 4607). In this collaboration it was PMTA's function to "initiate the ideas". (D-359 at 4609) [*Refused as stated*]

81c. PMTA paid $1,500 to the Pennsylvania State AFL publication, *Pennsylvania Federationist*, for a two-page advertisement, on the understanding that the editors would consider publication of an article by Crossett, a truck operator and officer of PMTA. (4607-4608) [*Refused as stated*]

82c. In the Autumn of 1952, the convention of International Brotherhood of Teamsters at Los Angeles adopted a resolution denouncing so-called "Hitlerian" actions of the railroads and demanding a Congressional investigation thereof. This resolution was prepared by, but not attributed to, Allied Associates and was promoted through Teamster President Dave Beck by Charnay and Bildersee, Allied executives who attended the convention at PMTA's expense. (D-360 to D-362 at 4611-4614) Shortly after the convention, Allied placed publicity about Beck in *Newsweek:* (D-363 at 4616) [*Affirmed*]

83c. Allied promoted national press and wire service coverage of the International Teamsters resolution without disclosing PMTA's role in its preparation and adoption. (D-361 and D-362 at 4611-4614) [*Affirmed*]

84c. In February, 1953, Charnay spent hundreds of dollars entertaining International Teamsters leaders in Miami; a few months thereafter, Allied prepared a telegram which was sent over Dave Beck's signature to AFL President George Meany and other labor leaders denouncing the railroads and urging labor support for the current big truck bill in the Pennsylvania legislature. The telegram

was attributed neither to Allied nor to PMTA." (D-364 to D-366 at 4617-4621). [*Affirmed*]

85c. PMTA solicited legislative support from the International Teamsters leaders at the Miami meetings because the Teamsters had political influence in Pennsylvania in addition to that which the truckers had. (Gormley, 4622-4627) [*Affirmed*]

(2) *UMW.*

86c. In 1951 and thereafter, PMTA actively solicited and received legislative and public relations support from the United Mine Workers largely through the activities of Ted Rodgers, Sr., a member of the PMTA Public Relations Policy Committee. (Rodgers, 4640-4647; D-367) [*Affirmed*]

87c. On behalf of PMTA, Rodgers solicited UMW official Tom Kennedy to make contact with Pennsylvania legislators in support of PMTA's 1953 truck weight bill without disclosure of the solicitation, and also succeeded in getting Kennedy to "straighten out" a local UMW leader who had spoken against the truckers' interests. (Rodgers, 4640-4647; D-367) [*Affirmed*]

88c. Charnay also sought to gain Kennedy's support for PMTA's 1953 truck weight bill, by sending him a memorandum falsely charging that the Maryland Road Test was a "propaganda stunt"; that many Pennsylvania organizations opposing the 1951 big truck bill had been "infiltrated, perverted and corrupted" by railroad agents; and that Allied and/or PMTA could prove "bribery" in connection with "at least three" such organizations, including the Grange and Township Supervisors. (D-91 at 4651-4655; see Counterclaimants' Request 50c(*d*) at p. 110) [*Denied*]

89c. Kennedy's aid in the Pennsylvania legislature was sought because PMTA considered it would "do some good" to have him "go to bat" for the truckers. (Rodgers, 4640, 4645) [*Affirmed*]

### (3) *CIO.*

90c. To obtain CIO support for SB 615, PMTA brought into Pennsylvania Frank H. Brown, a labor lobbyist and United Rubber Workers (CIO) leader from Ohio. Brown's services were paid for by Owen Orr, an Akron trucker. Brown obtained telegrams supporting SB 615 from the International officers of his union and the leaders of Pennsylvania locals. He also had Robert Garber, a Pennsylvania local Rubber Workers leader, send telegrams to several legislators urging passage of SB 615. None of these telegrams disclosed Brown's participation. (D-370 to D-373; Brown, 4678-4691) [*Affirmed*]

91c. In 1952 and 1953, Harry Boyer head of the Pennsylvania CIO, strongly opposed legislation to increase truck weights. To overcome this opposition PMTA believed it would be necessary either "to split" the CIO or "to bring pressure to bear from higher up". (D-374 at 4691) [*Affirmed*]

92c. In 1953, Brown, who again was brought from Ohio and paid by PMTA, made contact with local union leaders throughout Pennsylvania, and expanded his activities beyond his own union to include contacts with local leaders of the steelworkers union. In addition, Allied obtained support from United Steelworkers President David McDonald. (Brown, 4708; D-377 and D-378, Brown, 4703; D-381 to D-384 at 4714, 4721-4723; D-392 at 4747) [*Affirmed*]

93c. Brown sought support for the truck bill from a number of union locals to "neutralize" Boyer's opposition. Robertson Cameron, PMTA public relations director, prepared a form of resolution supporting PMTA's bill for use by union locals. The resolution did not disclose PMTA's participation in its preparation and adoption. (D-375 at 4695; Brown, 4725-4726; D-387 at 4742) [*Affirmed*]

94c. Brown endeavored to obtain passage of a resolution supporting increased truck weights at the Pennsylvania CIO convention in 1953, and in that connection PMTA reserved a suite of rooms at the Bellevue-Stratford for the officers of the Pottstown local who were committed to PMTA to sponsor the pro-truck resolution. (Brown, 4734-4746; D-385 to D-390) [*Affirmed*]

C. Use of Agricultural Groups.

**95c. Commencing in 1949, in order to achieve its legislative objectives, PMTA attempted to gain and use farm group support, or neutralize farm group opposition, from the Pennsylvania Cooperative Potato Growers, Inc., Pennsylvania Farm Bureau Federation, Pennsylvania Young Farmers, Farmers Union, and the Pennsylvania State Grange, through the following techniques:**

**(a) Applying "pressure" by one farm group upon another to overcome opposition;**

**(b) "Infiltrating" agricultural groups;**

**(c) Organizing personal contacts with farm group officials;**

**(d) Promoting Grange support through concealed use of friendly Grangers, including a trucking company employee;**

**(e) Organizing publicity and directing a floor fight at the Grange convention in 1952;**

**(f) Preparing and placing editorial columns and letters to newspapers for publication without disclosure of their source;**

**(g) Preparing resolutions and news releases for issuance by farm groups without disclosure of PMTA's authorship; and**

**(h) Paying $1,000 to a farm group which had cooperated with the PMTA program.** (Counterclaimants' Requests 96c to 104c) [*Refused as stated*]

(1) *Pennsylvania State Grange.*

96c. In 1950, PMTA attempted to gain support for its legislative program from the Pennsylvania State Grange through "pressure" by the New Jersey Grange which had been arranged by the New Jersey Motor Truck Association. (D-394 at 4790-4794) [*Affirmed*]

97c. In June, 1951, PMTA decided that the way to "attack this Grange opposition [was] to infiltrate the agricultural organizations themselves." It took steps in this direction through various suppliers, such as the oil companies and International Harvester. Frequent contacts were also made with Grange Secretary Joab K. Mahood in an effort to overcome Grange opposition. (D-395 to D-397 at 4794-4798) [*Affirmed*]

98c. PMTA supplied its material to Reba Burroughs, a trucking Company employee, for use in a presentation she was to make at a Grange meeting in Harrisburg in October 1952. To keep its connection with Reba Burroughs clandestine, PMTA asked her to "find some way of contacting us without jeopardizing your position." (D-399 at 4803-4804) [*Affirmed*]

99c. PMTA made a concerted effort to influence action regarding truck weight legislation at the Grange convention in October 1952 by "mustering of friendly Grangers" through direct contacts, through other farm groups and friendly legislators, and through a private meeting with the new Grange Secretary, J. Collins McSparran, all of which was done prior to the convention. John Deitrick, an Allied employee, was on hand at the opening of the convention in Allentown (registered at his hotel "under his own name" as he advised his superior). He had five key Grangers, including Reba Burroughs, operating inside the convention to advance PMTA's cause; he directed a variety of trucker-inspired publicity at the delegates; he engineered a "vigorous and brilliantly directed floor fight" which brought about

adoption of a resolution acceptable to the truckers. Despite these efforts the Grange ultimately reaffirmed its opposition to higher truck weights. (D-400 *to* D-404 at 4805-4816; D-399 at 4804) [*Affirmed*]

100c. Notwithstanding its final setback at the 1952 Grange convention, PMTA sought to capitalize on its efforts there by publicizing a so-called "split" in the Grange. For this purpose, PMTA prepared and procured the publication of news columns in the Harrisburg *Patriot* and Williamsport *Grit* which did not disclose their true authorship. It then caused reprints of the *Patriot's* story to be "put in plain envelopes and * * * taken to another community and dropped in mail." PMTA also drafted a letter to the editor of the *Patriot* and requested a Grange member to mail it over his own signature, without attribution to PMTA. (D-405 to D-407 at 4816-4829; D-645 at 5628-5629) [*Affirmed*]

(2) *Pennsylvania Cooperative Potato Growers, Inc.*

101c. In 1949, Pennsylvania Cooperative Potato Growers, Inc., adopted a resolution favoring higher permissible truck weights. PMTA tried "to get similar endorsements from other groups" and urged its local officers to obtain such endorsements from other "influence groups" which would be helpful in the legislative fight. (D-408 at 4820) [*Affirmed*]

102c. In 1951, the Potato Growers contacted legislators at PMTA's request and issued a letter and news release endorsing SB 615 which were prepared by, but not attributed to, PMTA. (D-409 to D-412 at 4822-4830) [*Affirmed*]

103c. In 1952, PMTA paid $1,000 to the Potato Growers for what the truckers described as "fine work in support of agriculture and public progress." (D-413 at 4830) [*Refused as stated*]

(3) *Other Farm Groups.*

104c. In 1949, PMTA endeavored to obtain endorsement of its legislative program by the Lehigh County Farm Bureau. PMTA files for the same year contain a news release favoring PMTA's truck weight bill, attributed to Farm Bureau Federation, with which PMTA maintained "excellent relations". Friendly relations were also maintained with the Pennsylvania Young Farmers and the Farmers Union. (D-414 to D-417 at 4832-4838) [*Affirmed*]

*D.* Use of Groups of Local Government Officials.

**105c. Since at least 1947, in order to achieve its legislative objectives, PMTA has attempted to gain and use support, or neutralize opposition, from groups of local government officials throughout the state, by employing the following techniques:**

**(a) Using official positions held by truck operators to influence official group action;**

**(b) Promoting, within official groups, factions favorable to PMTA's program;**

**(c) Using cooperative state legislators to influence local government officials;**

**(d) Enlisting delegates, and directing their actions, to influence official group conventions;**

**(e) Inducing the president of a group of municipal officials to write the Governor and legislators in support of SB 615 and attempting to publicize his support in a release prepared by PMTA but attributed to him, despite the fact that his organization had voted overwhelmingly to oppose the bill.** (Counterclaimant's Requests 106c to 116c) [*Refused as stated*]

(1) *Second Class Township Supervisors Association.*

106c. PMTA made a concerted effort involving "considerable preparation" to influence the 1950 convention

the Second Class Township Supervisors Association in its action regarding truck weight limits, by promoting in every county contacts between PMTA members and delegates to the convention. (D-448 at 5043-5049; D-449 at 5051). [*Affirmed*]

107c. PMTA attempted to promote its own interests within the Second Class Township Supervisors Association by an alliance with Thomas Stephenson, a member of the Association who was interested in the Home Rule movement. In return for Stephenson's support for the truckers, PMTA urged its contacts within the Association to support Stephenson's Home Rule program. (D-448 at 5043-5049) In 1951, PMTA maintained Stephenson's good will by a promise of PMTA advertising in his publi tion and in 1952 Cameron contemplated further "use" of Stephenson. (D-449 at 5051; D-450) [*Affirmed*]

(2) *Pennsylvania Borough and Boroughs Association.*

108c. Before and during the 1951 legislative session, PMTA asked Mayor M. A. Shoffner, of Parker, Pennsylvania, who had aided PMTA in 1947, and W. F. Crossett, a truck operator and official of Warren, Pennsylvania, to:

(*a*) investigate actions of their delegates regarding a resolution passed by the Boroughs Association opposing truck weight increases; and

(*b*) obtain, through "a little footwork", the passage of resolutions favoring SB 615 by their Borough Councils. (D-454 and D-455 at 5057; D-460 at 5062; D-452 at 5055) [*Affirmed*]

109c. In 1950 and 1951, PMTA attempted to influence the action of the Boroughs Association by recruiting advance support among delegates, "to prevent any unfavorable resolutions from passing the Association's convention". (D-453 at 5056; D-456 at 5058) [*Affirmed*]

110c. Also in 1951, PMTA attempted to influence borough officials at the local level by direct individual contacts and the formation of a local committee for this purpose. One truck operator whose borough council passed a resolution favoring SB 615 was congratulated by PMTA for "a real accomplishment". (D-457 to D-459 at 5059-5061) [*Affirmed*]

111c. In 1953, PMTA again sought the support of borough officials for its legislative program through the distribution of a circular letter. (D-461 at 5063) [*Affirmed*]

(3) *First-Class Township Commissioners Association.*

112c. In 1951, David M. Brickley, President of the Association of First Class Township Commissioners, was induced by PMTA to write legislators and the Governor in support of SB 615, notwithstanding the fact that the Association had voted overwhelmingly in opposition to the bill. (D-466 at 5069; D-463 at 5065; D-462 at 5064) [*Affirmed*]

113c. Shortly thereafter, Cameron prepared a news release announcing Brickley's support of SB 615 and mailed it to Brickley with the request that he give it to the newspapers. Although the release did not indicate that PMTA prepared it, Cameron told Brickley that he would be "entirely justified" in issuing it as his own. (D-464 at 5066) [*Affirmed*]

114c. When Brickley expressed reluctance about issuing PMTA's news release as his own, Cameron asked State Representative Edwin M. Ewing to prevail upon Brickley to issue the release, at least to local papers, so that Cameron or Ewing could obtain general wire service coverage if Brickley was unwilling to do so. (D-465 at 5067) [*Affirmed*]

115c. In 1952 and 1953, PMTA again tried to "line up" support of the First Class Township Commissioners through State Senator G. Robert Watkins of Delaware

County and G. A. Schwab of Atlantic Refining Company. Schwab, a township commissioner and PMTA chapter officer, had conducted a floor fight against the resolution opposing SB 615 adopted at the Commissioners' 1951 convention. (D-462 at 5064; D-467 and D-468 at 5070-5073; D-148A) [*Affirmed*]

(4) *State Association of County Commissioners and League of Third Class Cities.*

116c. In 1952, PMTA promoted direct personal contacts with officials of the State Association of County Commissioners and the League of Third Class Cities, in order to influence these groups to support the truckers' legislative program. (D-469 to D-471 at 5074-5077) [*Affirmed*]

*E.* Use of Civic and Other Groups.

**117c. Commencing in 1947, PMTA used the memberships of truck operators and their families in motor clubs and other civic groups to obtain the support or appearance of support of such groups for PMTA's legislative program.** (Counterclaimants' Requests 118c to 126c) [*Affirmed*]

(1) *Motor Clubs:*

118c. Prior to March, 1948, PMTA encouraged its members to participate in and become active as officers of motor clubs so that the alleged "true story" of highway transportation would reach all highway users, and thereafter urged its members to complain to their motor club officials about the clubs' opposition to PMTA bills. (D-472 to D-474 at 5078-5083; D-476 and D-477 at 5085-5088) [*Affirmed*]

119c. In 1953, Allied studied additional ways to counteract Keystone Automobile Club's opposition to PMTA legislation, and to "checkmate" other Keystone projects such as seeking reform of truck operation and curbing flagrant speed violations. (D-475 at 5083) [*Affirmed*]

120c. In 1953, PMTA suggested joint action with Pennsylvania Motor Federation to study the alleged railroad crossing "hazard". (D-478 at 5089) [*Affirmed*]

(2) *Women's Clubs.*

121c. In 1951, William Ward, a PMTA member, gave members of the Altoona Federation of Women's Clubs PMTA's version of the "correct story" about SB 615, in the hope of promoting a resolution favorable to the bill. (D-479 at 5091) [*Affirmed*]

122c. PMTA enlisted Mrs. Harry Gormley and Mrs. Jess Pusey, wives of PMTA members, to "further educate" the state leadership of the Federation of Women's Clubs to bring about a change in that group's opposition to SB 615. (D-480 to D-482 at 5093-5097) [*Affirmed*]

(3) *Chambers of Commerce and Other Groups.*

123c. In 1949, PMTA solicited legislative support from officials of the Philadelphia Safety Council and the Altoona Chamber of Commerce. The Secretary of the Altoona Chamber thereafter wrote to Senator John Snowden endorsing HB 560, but he did not disclose his solicitation by PMTA. (D-483 to D-485 at 5097-5099) [*Affirmed*]

124c. Ward, who was active in the Altoona Chamber of Commerce, on two occasions procured letters to Governor Fine signed by the Secretary of the Altoona Chamber endorsing SB 615. (D-485 and D-486 at 5099-5105) [*Affirmed*]

125c. Gogolin asked Ted Rodgers, Sr., whether someone with the Scranton Chamber of Commerce could write a letter to Governor Fine supporting SB 615, as if this was the official position of the Scranton group. Rodgers procured such a letter, signed by the Secretary of the Scranton Chamber, and forwarded a copy to Gogolin with instructions to "read and destroy". (D-485 at 5099) [*Affirmed*]

126c. In November, 1952, PMTA tried to influence the State Chamber of Commerce by obtaining a resolution endorsing greater truck weights from the Chamber's Transportation Committee, of which Gogolin was a member. This was to be done by organizing friendly members of the Committee in advance of a scheduled full meeting. (D-487 at 5105) [*Affirmed*]

*F.* Pennsylvania Motor Safety League.

**127c. PMTA carefully concealed that Pennsylvania Motor Safety League was its creature, conceived, formed, financed and promoted by PMTA for the advancement of its legislative and public relations program. PMTA created PMSL to provide for itself a vocal group nominally devoted to highway safety, but in fact designed to obtain improved highways for truck operations, to issue publicity harmful to the railroads and to establish favorable relationships for the trucking industry with other organized groups. Despite the substantial amounts expended in its promotion, PMSL never became active in the public relations field primarily because this lawsuit was filed before its organization was completed.** (Counterclaimants' Requests 128c to 138c) [*Refused as stated*]

128c. Pennsylvania Motor Safety League (PMSL) was incorporated in Delaware on August 1, 1952, by PMTA's general counsel. (D-424, Murdoch, 4941) In November, 1952, final plans for activation of PMSL was formulated at a meeting in New York, attended by representatives of PMTA and Allied, including John Murdoch, who was employed as executive secretary of PMSL. (Murdoch, 4849, 4859-4862) [*Refused as stated*]

129c. PMTA and Allied contemplated that:

(*a*) The "bond" between PMTA and PMSL was to be concealed except possibly from PMTA personnel;

(*b*) PMSL was to be used to achieve working relationships between PMTA and other groups, including farm groups and motor clubs;

(*c*) PMSL was to become a vehicle for promoting highway improvements; and

(*d*) PMSL would be used to harass the railroads, particularly in connection with the railroads' "retrenchment trend". (D-418 and D-419; D-422 at 4923) [*Refused as stated*]

130c. To avoid any "apparent connection" between his operations and PMTA, Murdoch was placed on the Allied payroll (Murdoch, 4853); he was instructed to pay PMSL expenses by cashing Allied checks at a bank and depositing the proceeds in his personal account at another bank (D-423, Murdoch, 4938-4940; D-425 to D-429, Murdoch, 4944-4952); and he was also instructed not to be seen with PMTA personnel (Murdoch, 4854-4856). [*Refused as stated*]

131c. Murdoch was told not to explain to the public PMTA's role in organizing and financing PMSL. (Murdoch, 4882) He knew that PMSL, in addition to its nominal purpose of promoting highway safety, was to be used in PMTA's campaign to improve highways for truck operations and that this must be concealed since it might discourage prospective members. (Murdoch, 4919-4921) [*Refused as stated*]

132c. In November, 1952, PMTA selected as prospective directors of PMSL William S. Yard, Esq., of Washington, Pennsylvania, John L. Tivney, a Harrisburg insurance man, and Judge Paul Lehman of Lewistown. (Murdoch, 4900-4914) Cameron had previously represented to Judge Lehman that PMSL was to be "completely divorced" from PMTA. (D-421 at 4906) [*Refused as stated*]

133c. On November 28, 1952, Tivney expressed concern to Murdoch that it would be impossible to "conceal from the opposition the true facts concerning the organization".

specifically the true role of PMTA and Allied in creating PMSL, the use of dummy incorporators, and the long delay following incorporation of the League. (Murdoch, 4983, 4991-4993, D-432 at 4975) [*Refused as stated*]

134c. Because of Tivney's misgivings, Murdoch recommended a "very tight plan" to foreclose discussion of PMSL's "true history" at the proposed organizational meeting, the recruitment of additional organizations as sponsors, and the public announcement of PMTA's part in founding PMSL. (D-431, D-431A, D-432; Murdoch, 4998-4999) Nonetheless, in his dealings with others, Murdoch continued to conceal PMTA's interest in PMSL. The invitations to the organizational meeting, which he drafted for Tivney's signature, stated that the meeting was the result of "several persons approaching the problem (of highway safety) individually". (D-436 to D-438; Murdoch, 5005-5012) In soliciting the support of civic leaders, he concealed that PMSL was a creature of PMTA and Allied. (Murdoch, 5013-5018; Murdoch, 5020-5023) [*Refused as stated*]

135c. In January, 1953, Tivney told Murdoch that PMSL was "right now, a losing venture" because the prospective members who were supposedly "in the bag" had not in fact been "sold" or "delivered". A re-examination of PMTA's plans for PMSL was in order because "these men can't be fooled". (D-440 at 5020) [*Refused as stated*]

136c. On January 26, 1953, Murdoch conferred with Bilderseeand Gogolin about problems arising from PMTA's approach to the new highway safety group, including the fact that the big men with whom Murdoch was dealing would not "be fooled" or "subscribe to a dummy set up". Murdoch believed that PMTA should not try to "ring in big, independent men to support a front outfit". (D-441, Murdoch, 4925-4930) [*Refused as stated*]

137c. After commencement of this lawsuit in January, 1953, Murdoch was directed to organize a new and "bona

fide" organization, because PMSL "might not have appeared" to be bona fide. (Murdoch, 4931-4936) In this manner PMTA sought to avoid the same criticism which it made of "the opposition, for setting up 'phony' organizations". (D-447 at 5042) [*Refused as stated*]

138c. After the abandonment of PMSL, PMTA agents approached Professor D. A. Weaver, of Pennsylvania State College, to become head of a new group called Citizens Committee for Highway Safety. Weaver was not told of PMTA's role in the organization of CCHS. (Murdoch, 4955-4959, 5025-5026) [*Refused as stated*]

*G.* Newspapers and Magazines.

**139c. Commencing as early as 1949 PMTA enlisted press support for its program by:**

**(a) "Planting" letters to editors from persons not connected with the trucking industry;**

**(b) Maintaining personal contacts with editors in order to place PMTA material "without attribution";**

**(c) Using advertising pressure as a lever for favorable press treatment;**

**(d) Using free-lance writers and columnists to publish its material over their names;**

**(e) Obtaining publication of articles in national magazines; and**

**(f) Employing news syndicates to disseminate PMTA material which concealed its authorship.** (Counterclaimants' Requests 140c to 145c) [*Denied*]

140c. Since as early as 1949 PMTA has had letters addressed to newspaper editors advocating PMTA's legislative program which were "planted" (D-496E at 5170), either under the name of local truck operators or by persons "not connected with the trucking industry" (D-496E at 5173), in a deliberate effort to conceal the participation

of PMTA in preparing and placing such letters. (D-496A to D-496V at 5166-5199) [*Denied*]

141c. PMTA has promoted and maintained close contacts with Pennsylvania newspaper editors to secure editorial support for the truckers' legislative program, and PMTA's representatives and allies personally approached "the publisher, or at least the editor, of every major newspaper in the State". (D-507 at 5222; D-498 to D-506 at 5201 at 5218) In a deliberate effort to avoid public disclosure of its participation in the preparation or organization of editorials, PMTA suggested the publication of editorial material "without attributing it to us", since "it would be much stronger that way". (D-508 at 5225) Ultimately PMTA published a brochure entitled "Pennsylvania Newspaper Support of the Fair Truck Bill SB 615", containing editorals from friendly Pennsylvania newspapers. (D-533 at 5277) [*Denied*]

142c. PMTA urged its members, ATA, and other truckers' groups, to place truck advertising in Pennsylvania publications which carried material considered "helpful" or "consistently favorable" to the trucking industry, and encouraged truck suppliers to use their national advertising space for the same purposes. (D-528 to D-530 at 5267-5273; D-532 at 5274) [*Affirmed*]

143c. PMTA prepared and supplied material in support of its legislative program to free-lance magazine writers and columnists for use in articles published under their own names. (D-498 at 5202; D-503 at 5214; D-511 at 5231-5232; D-513 at 5237; D-514 at 5241) all such attempts were subsequent to the railroad-Byoir antitruck campaign. [*Affirmed as modified*]

144c. PMTA's public relations personnel maintained personal contacts with national magazines, such as *Look* (D-512 at 5233; D-514 at 5241), *Saturday Evening Post* (D-516 at 5247; D-519 at 5252; D-521 at 5254), and *Fortune*

(D-521 at 5254), and prepared articles and material which they "peddled" for publication in national magazines. (D-509 at 5227; D-513 at 5237; D-515 at 5243) [*Affirmed*]

145c. PMTA paid Derus Associates, a Chicago news syndicate, and National Industries News Service, a Washington, D. C., syndicate, to distribute to Pennsylvania publications articles to promote the truckers' legislative program without disclosing PMTA's authorship. (D-522 to D-525 at 5255-5258; D-527 at 5262) [*Affirmed*]

*H.* Professor John S. Worley:

**146c. To advance its legislative program, PMTA retained John S. Worley, Professor Emeritus of Civil Engineering at the University of Michigan. PMTA, without disclosing its retention of Worley, used articles published by him which minimized the effect of heavy trucks on highways and cast suspicion on road tests. Statements to the same effect were prepared by Worley for PMTA's use at legislative hearings, one of which was presented to Governor Fine.** (Counterclaimants' Requests 147c to 151c) [*Affirmed*]

147c. In early 1951, PMTA retained John S. Worley, Professor Emeritus of Civil Engineering at the University of Michigan, at $100 per month, to advance PMTA's legislative program. (D-492 at 5215; D-488 at 5108) [*Affirmed*]

148c. In November, 1951 Worley published in the *American Mercury* an article entitled "In Defense of Trucks", which did not disclose that Worley was then on PMTA's payroll. ATA distributed Worley's article in reprints which indentified Worley as a leading highway authority but not as a PMTA employee. (D-489 at 5111-5112) [*Affirmed*]

149c. A statement by Worley in support of SB 615 was filed at Governor Fine's hearing by PMTA's counsel, who

identified Worley as a leading expert but not as a PMTA employee. Worley's statement did not disclose his connection with PMTA. (3717; D-490 at 5113; D-491 at 5114) [*Affirmed*]

150c. PMTA sought to use writings by Worley which did not "bear the seal and stamp of" PMTA to "win over a prominent member of the State Grange" (D-493 at 5117), and to bring about publication in *Engineering News-Record* of a story "which would convey general suspicion as to all past ...d pending road tests". (D-494 at 5119) This attempt to secure criticism of road tests occurred after the Byoir connection with the Maryland Road Test and the antitruck campaigns in Ohio and Pennsylvania on behalf of the railroads by Byoir had been revealed to the truckers. [*Affirmed as modified*]

151c. PMTA planned a hearing before the U. S. Senate Committee on Appropriations (the Bridges Committee) at which Worley would testify. (D-620 to D-622 at 5541-5554) Worley wished to be present "not as an employee" of PMTA "but as a professional consultant called in by Senator Bridges". (D-623 at 5554-5556) [*Affirmed*]

*i.* Governor Fine's Hearing on SB 615.

**152c. PMTA organized and directed the presentation in support of SB 615 at Governor Fine's hearing by:**

**(a) Soliciting the appearance of at least thirty witnesses;**

**(b) Supplying air transportation for witnesses;**

**(c) Preparing seemingly independent statements and resolutions that were submitted by organizations not connected with the trucking industry;**

**(d) Preparing and issuing news releases covering statements made in support of the bill, and**

**(e) Soliciting letters and telegrams to be sent to Governor Fine in such a way as to disguise their PMTA origin and the real interest of the senders.**

**The presentation was so contrived that even PMTA's attorney who conducted the case in favor of the bill was not aware of the extent to which the witnesses had been mobilized by PMTA. PMTA regarded the presentation as a commendable job which made out a far better case for SB 615 than was offered against it.** (Counterclaimants' Requests 153c to 162c) [*Affirmed*]

153c. On January 17, 1952, Governor John S. Fine held a hearing to determine whether he should sign or veto SB 615. (3544) [*Affirmed*]

154c. PMTA solicited the attendance of at least thirty persons or organizations who appeared at the hearing to support the bill. These included, among others, spokesmen from trade associations and from the food, chemical, oil, steel, glass, automotive and manufacturing industries, who were represented to the Governor as "a cross section of Pennsylvania". (D-144 at 3885; D-139 and D-140 at 3879-3880; D-157 at 3897-3898; D-147 at 3889; D-150A at 3892; D-155 at 3896; D-159 at 3901; D-165 at 3906; D-167 at 3907; D-169 at 3908; D-176 to D-194 at 3918-3928; 3764-3765) [*Affirmed*]

155c. PMTA prepared seemingly independent statements and resolutions that were submitted to the Governor by organizations such as Allegheny-Ludlum Steel Corporation and Oil Heat Association of Central Pennsylvania, Inc. (Compare D-145 and D-146 at 3886-3888a, with the transcript of hearing at 3659-3663; D-133 to D-135 at 3873-3875) [*Affirmed*]

156c. PMTA chartered an airplane to fly E. A. Cramlach, Vice President of the International Brotherhood of Teamsters, John B. Backus, President of Teamsters Joint Council 53, P. T. Sharpless, President of Sharpless Cor-

poration, and C. M. Kline, of Smith, Kline & French Laboratories, to the hearing." (D-138 at 3877-3878; 3685-3686) [*Affirmed*]

157c. PMTA prepared and issued news releases covering the statements submitted to the Governor by at least eleven organizations, including the Pennsylvania Potato Growers, Pennsylvania Young Farmers, Crown Can Company, Associated Pennsylvania Constructors, Bituminous Concrete Association, Harrisburg Steel Company, Brockway Glass Company, Inc., Pennsylvania Petroleum Association, and other representatives of Pennsylvania industry. (D-132 at 3872; D-149 at 3890; D-153 at 3894; D-154 at 3895; D-156 at 3896; D-158 at 3898; D-160 at 3901; D-162 at 3903; D-164 at 3904; D-166 at 3906; D-168 at 3908) [*Affirmed*]

158c. Before and after the hearing, PMTA solicited letters and telegrams to Governor Fine urging him to sign the bill. PMTA instructed its membership to disguise their real interest in the bill by writing the Governor as "motor club members" and "fair-minded citizens". PMTA requested the leaders of agricultural, construction, labor, and automotive groups to write in support of SB 615, and to encourage their membership to do likewise. (D-129 at 3864-3868; D-130 at 3869-3871; D-173 to D-175 at 3913-3917) [*Affirmed*]

159c. At the instigation of Frank H. Brown, then in the pay of PMTA, the international officers of United Rubber, Cork, Linoleum and Plastic Workers Union (CIO) sent telegrams to Governor Fine endorsing the bill and asking him to sign it. The telegrams did not disclose PMTA'S participation. (368"; D-143 at 3882-3884; Brown 4680-4682) [*Affirmed*]

160c. Even Bernard Segal, PMTA'S attorney at the hearing, was not aware of the extent to which PMTA had mobilized the persons and organizations appearing to support the bill. Segal represented to the Governor that

PMTA had asked "all members to refrain from coming to this meeting except a few official representatives", when, in fact, of the 85 persons representing 80 organizations who appeared to support the bill, 37 (not counting Segal) were themselves members of PMTA or represented organizations that were members. (3585; compare persons referred to at 3544-3769 with PMTA members identified in PMTA's Answer to The Pennsylvania Railroad Company's interrogatories 1(b) and 1(c) at 3954) [*Refused as stated*]

161c. Apparently Segal did not know that PMTA had solicited the attendance of a large number of persons appearing at the hearing, prepared resolutions or statements for them, and prepared and issued news releases covering their statements, for he represented to the Governor that "most of the people who appeared here today appeared here without my knowledge—I never heard of them—and without the knowledge of the [Pennsylvania Motor Truck] Association". (3764) [*Refused as stated*]

162c. PMTA, at the conclusion of the hearing, found that it had done "a commendable job" (D-175 at 3917), that it had "scored well ahead of the opposition" (D-170 at 3909), and that "a far better case was made out for SB 615 than was made out against the Fair Truck Bill" (D-171 at 3910-3911). [*Affirmed*]

## V. PURPOSE AND INTENT

163c. Since at least 1949, during a period when motor carriers were making substantial inroads into, and railroads were obtaining a steadily declining share of, the long distance freight hauling business available in Eastern Territory, plaintiffs combined and conspired through PMTA to secure legislation or governmental action which would increase the counterclaimants' costs and would decrease plaintiffs' costs by expanding their use of public facilities; and to prevent the passage of legislation which would increase their fees or taxes for the use of such pu-

facilities. Thus, as the necessary consequence of their acts, plaintiffs intended to restrain competition between themselves and counterclaimants; to divert profitable long haul freight business from counterclaimants to themselves; to deprive counterclaimants of profits; to drive counterclaimants out of the business of the long distance hauling of freight; and to acquire for themselves a monopoly position, free from counterclaimants' competition, in the long distance hauling of freight. [*Denied*]

## VI. EFFECTS OF PLAINTIFFS' CONSPIRACY.

### *A.* Public Injury.

164c. As a result of plaintiffs' combination and conspiracy, costs in the long haul freight business have been distorted and freight rates, in turn, have been correspondingly distorted. In consequence, competitive relationships in the transportation industry have been disturbed, the relative economy and inherent advantages of alternative modes of transportation have not been maintained, and uneconomical allocations of capital have been encouraged, with the net result that overall costs of transportation to the public have been increased and the strength of the railroads as a vital part of our national defense has been impaired. [*Denied*]

165c. As a further result of plaintiffs' combination and conspiracy, substantial volumes of freight have been diverted from the railroads, including counterclaimants, to trucks, including those operated by plaintiffs. Thus the public has been deprived of the lower transportation charges which result from the railroads' ability to transport increased tonnage without comparable increase in costs. (Mackie, 1441; P-203 at 1738-1739) [*Denied*]

### *B.* Private Injury.

166c. Substantial traffic and profits have been diverted from counterclaimants to plaintiffs as a result of plaintiffs'

combination and conspiracy, which has furthered the artificial rate disadvantage at which counterclaimants have been forced to operate in competing with plaintiffs for the long-haul freight business, (*a*) by hindering counterclaimants in exercising freedom of rate adjustment to reflect their true economies of operation, (*b*) by enabling plaintiffs to continue to charge rates reflecting the cost advantage of operating on rights-of-way maintained at public expense, and (*c*) by increasing counterclaimants' unit costs by precluding them from transporting increased tonnage; and which has increased counterclaimants' costs by forcing them to expend substantial sums of money in resisting the combination and conspiracy. [*Denied*]

*C.* Threatened Injury.

167c. Plaintiffs' combination and conspiracy, and its effects on the public and counterclaimants, are continuing. [*Denied*]

## DEFENDANTS' REQUESTED CONCLUSIONS OF LAW—COUNTERCLAIM.

Ic. The Court has jurisdiction of the parties and of the subject matter of the action. [*Affirmed*]

IIc. Plaintiffs have combined and conspired to restrain unreasonably interstate trade and commerce in the long distance hauling of freight, in violation of Section 1 of the Sherman Act. [*Denied*]

IIIc. Plaintiffs have combined and conspired to monopolize and have attempted to monopolize, interstate trade and commerce in the long distance hauling of freight, in violation of Section 2 of the Sherman Act. [*Denied*]

IVc. Counterclaimants have been injured in their business and property as a result of the violations by plaintiffs of Sections 1 and 2 of the Sherman Act, and are entitled to three-fold the damages suffered by them, together with costs and reasonable attorneys' fees. [*Denied*]

Vc. The violations by plaintiffs of Sections 1 and 2 of the Sherman Act are continuing, and threaten to do irreparable damage to counterclaimants, who are entitled to an injunction against the continuance of these offenses. [*Denied*]

Respectfully submitted,

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APRIL 5, 1957

## OPINION ON DAMAGES, ATTORNEY'S FEE AND INJUNCTIVE RELIEF.

July 22, 1958

CLARY, *J.*

This case is presently before the Court for entry of final judgment. The problems presented are (1) what injunctive relief shall be granted; (2) a proper assessment of damages, and (3) fixing a reasonable attorney's fee to be awarded the successful litigants, the plaintiffs. Considering point 2 first, there is no doubt, as is set forth in the body of the Opinion in this case handed down on October 10, 1957 (155 F. Supp. 768), that plaintiff Pennsylvania Motor Truck Association (PMTA) has sustained damages as a result of the illegal conspiracy found in this case. As in nearly every case involving violation of the antitrust statutes, there is, and the Court is fully aware of the problem involved, great difficulty in determining the exact amount of damages sustained by the plaintiff association. *Bigelow v. RKO Radio Pictures*, 327 U. S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927). The Court is also fully cognizant that damages may not be based upon sheer conjecture. *Story Parchment Co. v. Paterson Parchment Paper Co.*, supra; *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d, 416 (10th Cir. 1952), *cert denied* 344 U.S. 837 (1952). However, the fact that there is difficulty in determining an exact amount from the proofs adduced is a risk of which the wrongdoer defendants may not complain. The Court, under the *Eastman Kodak Co.; Story Parchment Company* and *Bigelow* cases, is entitled to award damages based upon reasonable inferences to be drawn from the testimony adduced. As against that there is the cautionary statement in *Homewood Theatre v. Loew's, Inc.*, 110 F. Supp. 398, 412 (D.C. Minn. 1952), that "the purpose of the Sherman Act

and the protection granted therein to those who have been damaged by wrongdoers in violation thereof should not be thwarted by making the act a haven for those who attempt to transform their actual damage into a fortuitous windfall". With these principles in mind we proceed to an examination of the claimed damages on the part of the Pennsylvania Motor Truck Association (PMTA).

The claim of the plaintiff Pennsylvania Motor Truck Association (PMTA) is based principally upon the total of all monies it paid to Allied Public Relations Associates, Inc. from May of 1952 to 1957. Included in these charges are not only its public relation activities but all expenditures in connection with the present suit. Certain other direct payments to individuals, printing houses and other organizations are also included, the details of which need not be outlined. Also claimed are a series of direct payments by PMTA for public relation purposes, from 1949 to 1957 independently of the Allied charges and based upon the increase in PMTA's direct public relations program over and above the average of its direct expenditure for that purpose for the years 1942 to 1949, the date when the Court found the conspiracy was formed. These sums aggregate $866,482.62 which, if allowed in full, would mean treble damages in the amount of $2,599,447.86.

The Court in its opinion, particularly in reference to the counterclaim, has characterized certain of the activities of the truckers as not proving a conspiracy in violation of the Sherman and Clayton Acts but, on the contrary, has characterized some of them as falling within the realm of fair competition in the light of the competitive situation then existing. The Court further stated categorically that such activities did not in and of themselves establish a conspiracy on the part of the truckers against the railroads. Because of these statements in the opinion, counsel for the plaintiffs have argued that all costs outlined above are reimbursable in a treble amount. This conclusion, of course,

does not follow and the Court rejects the imposition of damages based upon that assumption. While many of these factors were not found to be sufficient to convince the Court of the existence of a truckers' conspiracy, it does not follow as a matter of course that the Court is obligated to find that they were defensive measures. There were many activities of the truckers and Allied which had no connection with the present suit, were extremely beneficial to the truckers, and which could not possibly be classified as appropriate defensive measures of the conspiracy found to be existing in this case.

Another promise upon which counsel for the plaintiffs have argued that they should be awarded damages is the finding of the Trial Judge in the opinion that he believed the testimony of Noerr and Charnay that the purpose for the hiring of Allied was primarily to make an investigation of the activities of the railroads and, if sufficient evidence was adduced, to institute a law suit to compel cessation of illegal activities. The Court reiterates its finding in that regard but also finds that the activities of Charnay went far and beyond purely defensive measures. Charnay in the years of 1953 and 1955 expended large sums of money for public relation activities on behalf of the truckers over and beyond amounts necessary to counteract the previous activities of the railroad-Byoir conspiracy and for many purposes entirely disassociated with the railroad-truckers' fight. Insofar as these independent activities can be segregated, no allowance will be made therefor. Where the activities were in the main directed at defensive measures, even though there may be some incidental benefit to the truckers along other lines and cannot be separated, allowance will be made therefor. Examples of the type of activities that will not be allowed are as follows: Reimbursement to Allied for legal expenses without showing the necessity therefor and some connection with the obligations of Allied to PMTA. The only suggestion made as to the necessity for these expenses is that Charnay consulted certain

lawyers not connected with the present litigation as to whether there might be a right of action under the antitrust laws. Expenses of this nature have never been held to constitute part of damages awarded in antitrust actions. Another type of expense which has been attempted to be recovered here is that of a fund-raising organization hired to solicit funds from truckers throughout the country in support of the present law suit. Its compensation was based upon a percentage of funds solicited. The Court sees no basis for an allowance of this expenditure as damages in an antitrust action.

The attention of the Court has likewise been called to certain expense accounts, particularly of Charnay, head of Allied, when he attended conventions of the Teamsters' Union; on one occasion to help in re-election of Dave Beck as head of the Teamsters' Union in Los Angeles, and another time in Miami, Florida, to solicit teamsters' help for PMTA in the prosecution of the present law suit. An analysis of these two accounts indicates a total lack of connection with the present suit as to the Los Angeles trip. Insofar as the Miami trip was concerned, it shows an expenditure in excess of $4,000 within a relatively few days; also that the beneficiaries of those expenditures were officers and members of PMTA. That type of expenditure will also be disregarded in a calculation of damages.

The record in this case clearly indicates that concurrent with the institution of the present action the railroads and Byoir drastically reduced their scope of public relations operation. That is not to say that they ceased all activities looking toward the ultimate objective. The record indicates that close contact was kept by the railroad and Byoir with those individuals and organizations which had theretofore supported them and their point of view. On the other hand, the expenses of Allied in publicizing what has come to be known in this case as the Green affidavit and the facts elicited in depositions taken on behalf of the plaintiffs in this case reached extreme proportions, the cost of which cannot

by any stretch of the imagination be classified as defensive measures. Nevertheless, the plaintiffs herein attempt to recover all of these expenses, trebled, on the ground that the newspapers of the United States and press services were either not competent or might fail to give the facts the press coverage they really deserved. Plaintiffs argue that because the railroads were in a quiescent stage, but able and willing to resume activities should they prevail in this action, the activities of Allied and the expenses therefor should be considered as proper defensive costs. In making this assertion plaintiffs entirely ignore the fact that one of the prayers, and one of the most important prayers for relief in the complaint, was injunctive relief. The Court has found that they are entitled to such relief and it is being granted. There was, insofar as this case is concerned, no necessity whatever for the expenditure of fantastically high sums in publicizing this law suit. In effect, the plaintiffs have attempted to create monetary damages based upon the threat of a continuance of a course of conduct. The threat of such continuance is properly a subject for injunctive relief but any claim for monetary damages based thereon must be denied as being entirely too remote. After a full consideration of all the evidence the Court is satisfied that PMTA has suffered single damages in the sum of $217,358.00.

With respect to the problem as to what injunctive relief should be granted, the defendants question the power of the Court on constitutional grounds to enjoin the activities which they carried on in this case. See Noerr Motor Freight, Inc., et al. vs. Eastern Railroad Presidents Conference, et al., 155 F. Supp. 768, 820 (D.C. E.D. Pa. 1957). The defenses there mentioned have been again advanced. Particular emphasis has been laid on deprivation of the constitutional rights of freedom of speech, freedom to assemble and freedom to petition the legislature. Without further extended discussion the Court rejects the arguments made

on the ground that in making them the defendants have ignored the fact finding of the Court that a conspiracy in restraint of trade actually existed. "Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole". *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724 (1944); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940).

It is the duty of the Court to frame a decree which will suppress the unlawful practices found to exist and to take such reasonable measures as will preclude their revival. *Ethyl Gasoline Corp. v. United States*, supra at 461; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188 (1944). The injunctive relief in this case will, therefore, be designed to restrict the unlawful practices found to exist heretofore and to prevent future repetition of like nature.

The final question to be decided is the amount of counsel fees. Such allowance is authorized by Title 15 U.S.C.A. Section 15. The general rule is that the fixing of attorney's fees is within the discretion of the trial court reasonably exercised and that a court of review will only interfere where there is an abuse of that discretion. *W. W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d, 79 (2nd Cir. 1939); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951).

The reasonableness of an attorney's fee can only be determined with reference to a particular case. What is reasonable under one set of circumstances may be entirely unreasonable under another. A review of the cases indicates some of the factors considered by the courts in making an award of a "reasonable attorney's fee". These include: (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the government, *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d, 846, 858-859 (8th Cir. 1952); *William H.*

*Rankin Co. v. Associated Bill Posters of United States*, 42 F.2d, 152-156 (2nd Cir. 1930); *Bordonaro Bros. Theatres v. Paramount Pictures*, 113 F.Supp. 196, 197 (D.C. W.D. N.Y. 1953); (2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel, *Straus v. Victor Talking Machine Co.*, 297 Fed. 791, 806 (2nd Cir. 1924); *Darden v. Besser*, 147 F. Supp. 370, 382 (D.C.E.D. Mich. 1956); *Webster Motor Car Co. v. Packard Motor Car Co.*, U.S.D.C. D.C. June 30, 1955, C. A. 674-53 (Holtzoff, J. unreported); *Cape Cod Food Products v. National Cranberry Ass'n.*, 119 F. Supp. 242-244 (D.C. Mass. 1954), and *Bordonaro Bros. Theatres v. Paramount Pictures*, supra at 197. Contra *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561, 570-571 (7th Cir. 1951); (3) time and labor spent, *Darden v. Besser*, supra at 382; (4) magnitude and complexity of the litigation, *Darden v. Besser*, supra at 382; *Webster Motor Car Co. v. Packard Motor Car Co.*, supra. Contra *Milwaukee Towne Corp. v. Loew's, Inc.*, supra at 570-571; (5) responsibility undertaken, *Darden v. Besser*, supra at 382; (6) the amount recovered, *Cape Cod Food Products v. National Cranberry Ass'n.*, supra at 242-244. Contra *Milwaukee Towne Corp. v. Loew's, Inc.*, supra at 571; and (7) the knowledge the Court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiffs prior to trial, *Applebaum and Sims v. Paramount Pictures, Inc.*, 1950-1951, CCH TRADE CASES par. 62, 944 (D.C. S. D. Miss. 1951).

In addition to all the factors mentioned above two other tests have been proposed by equally eminent jurists for use by courts in carrying out the duty imposed on them by the statute. These two tests merit further discussion.

In the case of *Cape Cod Food Products v. National Cranberry Assn.*, supra at 244, Judge Wyzanski determined that the reasonable attorney's fee contemplated in 15 U.S. C.A. § 15 is "what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market

price, the figure which a willing successful client would pay a willing successful lawyer".

The other test was proposed by Judge Holtzoff in his unreported opinion in *Webster Motor Car Co. v. Packard Motor Car Co.*, supra. In that case Judge Holtzoff stated:

> "Although there are some expressions to the contrary, it is the view of this Court that in such a case as this, it is not the function of the court to fix the fee that counsel should charge his client, and then assess that against the defendant. My conception is that it is the duty of the court to determine what contribution shall be made by the defendant toward the fees of plaintiff's counsel. I say that lest there be any misunderstanding, it is not my intention to determine or express an opinion or even an intimation how much plaintiff's counsel should charge his client. I might say in passing that in my opinion the amount that the plaintiff's counsel is entitled to charge his client is much larger than the amount I intend to award as the amount to be paid by the defendant."

In the case of *Milwaukee Towne Corp. v. Loew's, Inc.*, supra at 570, Chief Judge Major stated flatly that any agreement between plaintiff and his counsel regarding compensation is "wholly immaterial to the issue before the court," i.e., what is a reasonable attorney's fee? The court thus concludes that any agreement between a willing successful client and a willing successful lawyer as to compensation is not determinative of what is a "reasonable attorney's fee" under 15 U.S.C.A. § 15.

The Court also is not convinced of the correctness of Judge Holtzoff's conception that it is the duty of the court in making its award of attorney's fees under 15 U.S.C.A. § 15 "to determine what contribution shall be made by the defendant *toward* the fees of plaintiff's counsel" (emphasis supplied). While the Court feels that neither of these tests is the proper one to be applied under 15 U.S.C.A.

15, the Court is of the opinion that they do represent the poles at some point between which the true standard lies. Any attempt to fix exactly at what point between these poles the true test lies would be fruitless. To further attempt to ascertain the intent of Congress in providing for the award of a "reasonable" attorney's fee would be futile and serve only to confuse the issue.

It has been apparent in a review of the cases respecting the award of counsel fees in antitrust actions that there has developed a percentage theory of compensation based upon the award of single damages. It is readily understandable that such a procedure could be entirely proper under the circumstances of a particular case. However, in the instant case, we have the unusual situation where the plaintiffs in order to expedite the trial of the case and to obtain a more prompt determination of the rights and liabilities of the parties have stipulated that they would not claim certain damages to which they might otherwise be entitled. This Stipulation greatly shortened the trial of the case. To adopt a percentage approach would, therefore, do a grave injustice to the plaintiffs. Counsel for the plaintiffs in this case, prominent and experienced members of the Philadelphia Bar, have spent over forty-six hundred hours in the preparation and trial of this case. Any award based upon a moderate percentage of the single damages would, therefore, be entirely inadequate to constitute a reasonable attorney's fee.

The Court is of the opinion that the test to be applied may be stated quite simply—what, in the opinion of the Trial Judge, after considering all the factors in the case (including but not limited to those outlined above), would be a reasonable charge for the services of plaintiffs' counsel? The statement is simple; application is very difficult. However, after a consideration of all the factors in the case, the arguments and briefs of counsel, the Court awards Two Hundred Thousand ($200,000.00) Dollars as a reasonable attorney's fee.

It has been brought to the attention of the Court that under the decision of *Dextone Co. v. Building Trades Council of Westchester County, et al.*, 60 F.2d 47 (2d Cir. 1932), since this action sounds in tort and is for the vindication of a private, not a public right, in a civil, not a criminal proceeding, a joint rather than a several judgment must be entered without apportionment of damages among the respective parties. Such a joint judgment will be entered in this case.

A formal final decree will be filed concurrently herewith.

**ORDER IN MILLS NOVELTY CO. v. NATIONAL DAIRY PRODUCTS CORPORATION, AT LAW NO. 44394 (N. D. ILL. 1936—UNREPORTED).**

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DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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|---|---|
| MILLS NOVELTY CO., a corporation, *Plaintiff*, v. NATIONAL DAIRY PRODUCTS CORPORATION, a corporation, et al, *Defendants.* | At Law No. 44394 |

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ORDER.

THIS CAUSE came on to be heard April 6, 1936, on oral argument on the several written motions of the defendants NATIONAL DAIRY PRODUCTS CORPORATION, HYDROX CORPORATION, J. D. ROSZELL COMPANY, CHAPELL ICE CREAM COMPANY, INC., NATIONAL DAIRY PRODUCTS COMPANY, INC., CONSOLIDATED PRODUCTS COMPANY, HIGHLAND DAIRY FARMS COMPANY, SUGAR CREEK CREAMERY COMPANY, THOMPSON ICE CREAM COMPANY, ALLEN ICE CREAM COMPANY, FREDERICK J. BRIDGES and LEE M. PEDIGO, by Nicholson, Snyder, Chadwell & Fagerburg, their attorneys; PREMIER DAIRY BRANDS, INC. (a Delaware corporation), THE BORDEN SALES COMPANY, INC. (a New York corporation), BORDEN'S MILK PRODUCTS COMPANY, INC. (a Delaware corporation), THE BORDEN COMPANY (an Illinois corporation), BORDEN'S CONDENSED MILK COMPANY OF ILLINOIS (an Illinois corporation), BORDEN'S CONFECTIONERY & FOODS COMPANY (an Illinois corporation), BORDEN'S DAIRY COMPANY (an Illinois corporation), BORDEN'S FARM PRODUCTS CO. OF ILLINOIS, INC. (an Illinois

corporation), BORDEN'S BUTTER & EGG COMPANY (an Illinois corporation), JOHN T. CUNNINGHAM ICE CREAM COMPANY, INC. (an Illinois corporation), JERSEY ICE CREAM COMPANY, INC. (an Illinois corporation), THE CITY DAIRIES COMPANY, INC. (an Illinois corporation), WIELAND DAIRY COMPANY, INC. (an Illinois corporation), CLOVERLEAF MILK COMPANY (an Illinois corporation), WIELAND ICE CREAM COMPANY, INC. (an Illinois corporation), FRED D. WALMSLEY, PAUL J. DONOVAN and ALLAN D. CUNNINGHAM, by Cutting, Moore & Sidley, their attorneys; and GOLDEN STATE SALES CORPORATION, by Fisher, Boyden, Bell, Boyd & Marshall, their attorneys, all of said motions praying that certain allegations in the complaint filed herein be stricken as herein set forth;

And the Court having heard oral arguments by counsel for said defendants in support of said motions and by counsel for the plaintiff in opposition thereto, and having read and considered briefs filed by counsel for the respective parties;

And it appearing to the Court that paragraphs one hundred seventeen (117), one hundred eighteen (118), one hundred nineteen (119), one hundred twenty (120), one hundred twenty-one (121), one hundred twenty-two (122), one hundred twenty-three (123), one hundred twenty-seven (127) and one hundred twenty-nine (129), and the matter hereinafter quoted contained in paragraphs eighty (80) and one hundred nine (109), charge in substance that in furtherance of and in pursuance of an alleged conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective defendants prepared and sponsored legislation and ordinances in bad faith to be introduced in the legislatures and municipal legislative bodies in various states and cities in the guise of health and sanitary regulations but with the secret purpose of suppressing competition from counter freezers, some of said laws and ordinances having been enacted and others proposed and not

enacted; used such pending legislation to delay and defeat the purchase of counter freezers; threatened to prepare and sponsor prohibitive state and municipal legislation if prospective purchasers of counter freezers did not desist from purchasing or using counter freezers; worked with state and local governmental officials, prevailing upon them and assisting them in harassing and interfering with prospective purchasers and operators of counter freezers; and that other allegations in the aforesaid paragraphs and portions thereof are to the same effect;

And it further appearing to the Court that any alleged laws enacted or alleged acts done by the state and local governments or officials thereof cannot be made the basis for the recovery of damages under the federal anti-trust laws whether or not sponsored by the defendants in the course of an alleged conspiracy in restraint of trade; and it further appearing to the Court that said allegations do not charge the commission of unlawful acts by the defendants; that said alleged activities of the defendants in sponsoring or threatening to sponsor state or local legislation or governmental action amounted to nothing more than the exercise or statement of intention to exercise their right peaceably to assemble and petition the government for a redress of grievances; that such right is protected by the First Amendment to the Constitution of the United States against congressional interference, irrespective of whether such laws or governmental acts were subsequently enacted or carried out; that said allegations do not charge acts or offenses prohibited by the anti-trust laws; and that this Court cannot take cognizance of the plaintiff's grievances, if any, arising out of the said alleged acts of the defendants;

Now, Therefore, Be It and It Is Ordered and Adjudged:

(1) That paragraphs one hundred seventeen (117), one hundred eighteen (118), one hundred nineteen (119), one hundred twenty (120), one hundred twenty-one (121), one

hundred twenty-two (122), one hundred twenty-three (123), one hundred twenty-seven (127) and one hundred twenty-nine (129) of the complaint filed herein April 29, 1935, be and they hereby are, and each of them hereby is, stricken from the complaint.

(2) That the following matter contained in paragraph one hundred nine (109) of said complaint:

> "public officials, legislatures and governmental bodies of municipalities in the several states of the United States and in the cities, towns and villages thereof"

is hereby stricken from the complaint.

(3) That the following matter contained in paragraph eighty (80) of said complaint:

> "and a legislative bureau which contacts with health and food officials and which keeps a record of all state and city legislatures relating to ice cream and advises with its members, including the corporate defendants herein, in regard to such legislation, as well as keeping them informed upon the progress of such legislation"

is hereby stricken from the complaint.

Exception for the pltf because order not in accord with memorandum & of motion.

D L B

4/15/36

ENTER:

BARNES,
*Judge.*

Dated: April 21, 1936.

## MEMORANDUM OPINION IN MILLS NOVELTY COMPANY v. THE BORDEN COMPANY, 3 CCH TRADE REG. REP. ¶ 25,041 (S. D. N. Y. 1937—NOT OFFICIALLY REPORTED) AND RELEVANT PARAGRAPHS OF THE COMPLAINT.

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Mills Novelty Company v. The Borden Company
United States District Court, Southern District of New York, March 11, 1937.

MEMORANDUM

PATTERSON, D. J. Sponsoring legislation and inciting administrative officials to do what must be taken as their duty cannot be an actionable wrong. The fact that these things are done in furtherance of a combination to restrain interstate commerce does not make them actionable. *American Banana Co. v. United Fruit Company*, 213 U. S. 347, 358. It follows that paragraph 83 in part, paragraphs 91-97 inclusive, and paragraph 102 should be stricken as irrelevant. This is in accord with the decision of Judge Barnes in the District Court for the Northern District of Illinois and with the ruling of the Federal Trade Commission.

The action being one for treble damages, there is no room for punitive damages over and above the trebled amount. I agree with what Judge Knox said in *Hansen Packing Co. v. Armour Co.*, 16 Fed. Supp. 784, 788. Paragraph 118 will be stricken, as will the corresponding clause in the prayer for relief.

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PARAGRAPHS OF THE COMPLAINT REFERRED TO IN JUDGE PATTERSON'S DECISION

83. That on or about and between the first day of January 1931, up to the present date, defendants individually

and collectively, and as members of the "International Association" and/or affiliated associations, entered into a combination and conspiracy to defame, disparage, boycott, and harass the plaintiff and prevent and restrain it from engaging in interstate commerce by exercising their great influence and their suppressive means and methods, and by using coercive means upon the public, persons, firms, corporations, publications, public officials, legislatures and governmental bodies of municipalities in the several states of the United States and in the cities, towns and villages thereof, including customers and prospective customers of plaintiff to the ultimate damage and destruction of plaintiff's business, in a manner more particularly set forth herein, and have united in a common cause of unfair competition and have cooperated and confederated with each other and with other persons, firms and corporations not herein named as defendants because they are not within the jurisdiction of this court, in a conspiracy to prevent, suppress and delay the sale, marketing, installation, purchase, use of and operation of "Counter Freezers" including "counter freezers" manufactured by plaintiff herein by unfair acts, tactics, methods, practices, things done or attempted to be done, and each of them.

91. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, defendants, their officers, directors, servants, employees and agents called upon and worked with the various city and state sanitary inspectors and officials to prevail upon them and assist them in harassing and interfering with prospective purchasers and operators or owners and operators of "counter freezers" to the extent of causing them great loss of time, heavy financial expense and causing them to discontinue the installation of or use and operation of said "counter freezers" including "counter freezers" manufactured by plaintiff, and more particularly,

the defendants, their officers, directors, servants, employees and agents prevailed upon said officials to classify said "counter freezers" as an ice cream factory thereby imposing upon said owners or operators of "counter freezers" the burden of providing all the expensive and complicated equipment which are necessary in a manufactory engaged in the wholesale manufacture of ice cream, rendering the operation of such "counter freezers" unprofitable and impracticable, all to the damage of plaintiff's "counter freezer" business.

92. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective the "International Association", its affiliated associations and members thereof, including the defendants herein, their officers, directors, servants, employees and agents prepared and sponsored legislation and local ordinance or amendment thereto in bad faith to be introduced and sponsored by its members including the defendants herein, into the law-making bodies of the several states and cities with the apparent purpose and guise of such legislation and local ordinance or amendments thereto, to qualify, unify and establish a standard of sanitary regulations for the manufacture of ice cream, but with the secret and undisclosed unlawful purpose and intent behind such legislation and local ordinance or amendments thereto, and the undisclosed unlawful effect of the provisions of the same being, to destroy or suppress the growth of competition from "counter freezers" and making it impossible or practically impossible for prospective purchasers and operators of "counter freezers" to enter the field for operators or owners of "counter freezers" or to continue in the field; with the principal intent of the defendants, their officers, directors, servants, employees and agents in preparing and sponsoring such legislation and local ordinance or amendments thereto is shown in the following situation, among others, that as

soon as they succeeded in introducing the same, they used this pending legislation or pending local ordinance, or pending amendment or amendments thereto as a threat, club or coercive measure to delay and defeat the purchase of "counter freezers" including "counter freezers" manufactured by plaintiff and eliminate the continued use and competition of "counter freezers"; with the bad faith of the defendants, their officers, directors, servants, employees and agents in preparing and sponsoring such legislation and local ordinances or amendments thereto is shown by the situation, among others, that the proposed provision that all ice cream mix must be pasteurized at the point of freezing—a requirement which would work an extreme hardship on "counter freezer" operators and owners, was "soft peddled" and laid aside, because it was found that many members of the "International Association", including the defendants herein, could not meet this regulation without heavy expense; and in the added situation, amongst others, that in their zeal to secure stringent regulations which could be met by members of the "International Association" including the defendants herein, but not by the "counter freezer" operators and owners, members of the "International Association", including the defendants herein presented bills, ordinances or amendments thereto, to their respective law-making bodies which were defeated because of their unnecessarily drastic provisions, with the result that the "International Association" began advising their members, including the defendants herein, to avoid setting up these specific drastic regulatory provisions in proposed statutes, ordinances or amendments thereto; but rather to make these proposed enactments general in nature with the provision that a supervisory authority set up appropriate regulations for the carrying out of the act, ordinance or amendment with it being secretly pointed out to the members of the "International Association", including the defendants herein, that the chances of getting drastic regulations directed against the installation, use and occupation of

"counter freezers" adopted by an administrative authority were much better than getting them approved by law-making bodies, all to the detriment and damage of plaintiff's interstate business.

93. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective the "International Association", and its members including the defendants herein, their officers, directors, servants, employees and agents threatened to prepare and introduce and sponsor prohibitive state legislation, local ordinances and amendments thereto, as set forth in paragraph "92" above, if prospective purchasers and operators of "counter freezers" do not desist from purchasing said "counter freezers", do not desist from using and operating said "counter freezers," all to the damage of this plaintiff.

94. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, legislation and regulation was proposed in the various municipalities, cities and states of the U. S. for the purpose of imposing upon owners of "counter freezers" the burden of paying exorbitant license fees for the privilege of operating such "counter freezers", all to the damage of this plaintiff.

95. That plaintiff has been up to great trouble, embarrassment and expense in thwarting such proposed legislation and in preventing the classification of "counter freezers" as manufacturing plants and in eliminating the burden imposed by such proposed legislation upon the owners and operators and proposed owners and operators of "counter freezers" including those manufactured by plaintiff.

96. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the in-

terstate commerce of the plaintiff and to make the same effective the classification of "counter freezers" as manufacturing plants, in accordance with ordinances, regulations and laws now in effect or being prepared in the various municipalities, cities and states of the U. S., require the following: That the owners of such "counter freezers" pasteurize the mix at the point of manufacture, use live steam for sterilization and cleansing purposes; maintain a separate freezing room; construct the floors of the freezing room so that the same shall slope to a drain; that the floors of the freezing room be composed of some impervious material such as concrete or tile; all of which requirements were unnecessary for the sanitary operation of the "counter freezers" and were proposed or enacted to discourage and did discourage the purchase and operation of such "counter freezers" to the detriment and damage of the business of the plaintiff.

97. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, and despite plaintiff's efforts to thwart such proposed legislation and in preventing such classification of "counter freezers" and its attendant burdens, the defendants, their officers, directors, agents, servants and employees succeeded in having such legislation enacted as laws in various municipalities, cities and states of the U. S. all to the damage of this plaintiff.

102. That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective and in order to discourage the sale of "counter freezers" manufactured by the plaintiff to state institutions such as hospitals, legislation was proposed to the effect that all subdivisions of the state and all state institutions were to refrain from going into business now operated by private individuals or private institutions, all to the damage of this plaintiff.

## ORDER IN MILLS NOVELTY CO. v. WESTERN DAIRIES, INC., AT LAW NO. 7506-M (S. D. CAL. 1937—UNREPORTED) AND RELEVANT PARAGRAPHS OF AMENDED COMPLAINT.

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ORDER.

At a stated term, to wit: The September term, A. D. 19 , of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the thirty-first day of December in the year of our Lord one thousand nine hundred and thirty-seven.

Present:

THE HONORABLE: PAUL J. McCORMICK, *District Judge*.

| | |
|---|---|
| MILLS NOVELTY CO., A CORPORATION, *Plaintiff* | |
| *v.* | At Law No. 7506-M |
| WESTERN DAIRIES, INC., A CORPORATION, ET AL., *Defendants.* | |

The pleadings by the government in prosecutions or suits against offenders of anti-trust laws of the United States are not to be governed by the same rules that are applicable to actions by private suitors against competitors to recover damages under Section 7 of the Sherman Act (26 Stat. 210).

The former pertain to rights and duties of the sovereign power to prevent and redress public wrongs and to safeguard the public interest against monopoly and unlawful discrimination. These prerogatives of sovereignty

necessitate liberality in pleading in order to accomplish the public purpose of anti trust legislation. In private actions such as this case, the proceeding is of a purely private nature—the redress of a private tort—and the litigant claiming damages must by appropriate pleadings allege the specific and concrete facts which are the damnifying elements that have injured his interstate activities and business.

The Ninth Circuit Court of Appeals, in *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, has clearly ruled that in private actions it is not the conspiracy that furnishes the right of recovery, but rather the particular injuries to the plaintiff that result and flow from the conspiracy of the defendants. Such being the controlling rule here, the complaint must, as against demurrer, allege the specific interstate acts or transactions of the respective defendants from which the plaintiff company claims that it has sustained pecuniary damages.

We think it also clear from the *Foster & Kleiser* decision, *supra*, that the applicable statute of limitations (Subdivision 1, Section 338, California Code of Civil Procedure) bars any damaging acts or transactions, not fraudulently concealed, prior to March 3, 1933.

The allegations of lack of knowledge and concealment in paragraphs CXXII and CXXIII of the amended complaint are mere conclusions, and in the light of the court's knowledge from the records and files of this case and of the prior ruling on demurrer entered herein on May 19, 1937, these two allegations should be regarded as sham and frivolous. See *Morse v. Lewis*, (C. C. A. 1) 54 F. (2d) 1029; *United States v. Greater New York Live Poultry Chamber of Commerce*, 53 F. (2d) 518.

The allegations of punitive or vindictive damages found in paragraph CXXXIV of the amended complaint are improper and irrelevant in a private action for damages under Section 7 of the Sherman Act. The measure of relief is the statute and its provision for trebling the actual

damages precludes any further damage claim. See *Hansen Packing Co. v. Armour & Co.*, 16 Fed. Supp. 788.

The several special demurrers of respective defendants that question the sufficiency and certainty of the amended complaint and particularly the allegations of paragraphs LXXXXVIII to and including CXX inclusive are sustained. Exceptions allowed plaintiff.

The several motions of the respective defendants to strike from the amended complaint paragraphs CXXII and CXXIII are granted, and said paragraphs are and each is stricken from said amended complaint. Exceptions allowed plaintiff.

The several motions of the respective defendants to strike from the amended complaint paragraph CXXXIV and all other portions of said amended complaint relating to or praying for "punitive or vindictive damages" other than such as are expressly provided for in Section 7 of the Sherman Act (26 Stat. 210) are granted. Exceptions allowed plaintiff.

In amplification of the aforesaid ruling and because the special demurrer of defendants Borden Dairy Delivery Company, Inc., and the Borden Company of California, Ltd., are typical and substantially the same as the special demurrers of each defendant respectively herein, the following parts of the special demurrer of defendants Borden Dairy Delivery Company, Inc., and The Borden Company of California, Ltd., are sustained viz:

Paragraph II, 1 (a), (b), (c), (g), (h), (k), (m), (n), (q); 2 (a), (b), (c), (g), (h), (j), (m), (n), (o); 3 (a), (b), (c), (d); 4 (a), (b), (c); 5 (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n); 6 (a), (b), (c); 7 (a), (b), (d), (e); 8 (a), (b), (d); 9 (a), (b), (d), (e); 10 (a), (b), (c), (d), (e); 11 (a), (b), (c); 12 (a), (b), (c); 13 (a); 14 (a), (b), (c); 15 (a), (b), (c); 16 (a), (b); 17 (a), (b), (c), (d); 18 (a), (b); 19 (a), (b), (c); 20 (a), (b); 21 (a), (b); 22 (a); 23 (a), (b), (c); 24; Paragraph III; Paragraph IV, and Paragraph V.

The plaintiff is allowed thirty (30) days from notice of this ruling within which to amend the amended complaint herein.

In the interests of economy of time and records, the foregoing rulings and orders are made applicable to and are entered as to each demurring and movent defendant in this action, without restating and rewriting said order as to each defendant separately. The foregoing order is applicable to and is intended for the benefit of defendants Adohr Milk Farms, Qualitee Dairy Products Company, Hage's Ltd., Beverly Dairies, Ltd., and Excelsior Creamery Company, Ltd.; Borden Dairy Delivery Company, Inc., the Borden Company of California, Ltd.; Mountain View Dairies, Inc.; Creameries of America, Inc.; Crown City Dairy Company, Peacock Dairies, Inc., George Stanley McKenzie, Paul R. Chaney, Olive W. Johnson, P. A. Kells, George W. Weatherly, Haydon Ice Cream Co.; Good Humor Ice Cream Co., Inc.; Ice Cream Council of Southern California; Western Dairies Inc., Wester Dairy Products Company, Western Dairy Products, Inc., Samuel Harry Berch, Kaufman L. Carver, George W. Burt, J. Frank Holt, John A. Tongue, Henry E. McGee, Roger W. Jones, Edward G. Roller, Herbert Sponholz, John Richards, and William Anderson Taylor, sued herein as William Ambrose Taylor; Golden State Company, Ltd., Golden State Ice Cream Company, Kenneth H. Keefer as trustee of Pacific Dairy Products Company, Chester Earl Gray, Lowell H. Wilson, Oliver B. Wyman, John Freuler, Frank B. Pellissier, Thomas B. Eastland, John Frederick Eastwood, Ella W. Ennis, Kenneth H. Keefer, Walter G. Gaeteke and Harry S. Baird; and Chapman Ice Cream Company.

A True Copy. Feb. 26 1953
Attest, Etc.

Edmund L. Smith, Clerk U. S. District Court,
(Seal) Southern District of California

By L. CUNLIFFE, Deputy
"L. Cunliffe"

RELEVANT PARAGRAPHS OF AMENDED COMPLAINT REFERRED TO IN JUDGE MCCORMICK'S ORDER.

(35) LXXXXVIII.

That on or about and between the 1st day of January, 1931, up to the present date, defendants, individually and collectively, and as members of the "International Association" and/or affiliated associations, entered into a combination and conspiracy to defame, disparage, boycott, and harass the plaintiff and prevent and restrain it from engaging in interstate commerce by exercising their great influence and through subversive means and methods, and by using coercive means upon the public, persons, firms, corporations, publications, public officials, legislatures and governmental bodies of municipalities in the several states of the United States and in the cities, towns and villages thereof, including customers and prospective customers of plaintiff to the ultimate damage and destruction of plaintiff's business, in a manner more particularly set forth herein, and have united in a common course of unfair competition and have co-operated and confederated with each other and with other persons, firms and corporations not herein named as defendants because they are not within the jurisdiction of this Court, in a conspiracy to prevent, suppress and delay the sale, marketing, installation, purchase, use of and operation of "Counter Freezers," including "Counter Freezers" manufactured by plaintiff herein by unfair acts, tactics, methods, practices, things done or attempted to be done, and each of them.

* * *

(39) CVI.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, defendants, their officers, directors, servants, employees and agents called upon and worked with the various city and state sanitary inspectors and officials to prevail upon them and assist them in harassing and interfering with

prospective purchasers and operators or owners and operators of "Counter Freezers" to the extent of causing them great loss of time, heavy financial expense and forcing them to discontinue the installation of or use and operation of said "Counter Freezer" including "Counter Freezers" manufactured by plaintiff, and, more particularly, the defendants, their officers, directors, servants, employees and agents prevailed upon said officials to classify said "Counter Freezers" as an ice cream factory thereby imposing upon such owners or operators of "Counter Freezers" the burden of providing all the expensive and complicated equipment which are necessary in a manufactory engaged in the wholesale manufacture of ice cream, rendering the operation of such "Counter Freezers" unprofitable and impractical, all to the damage and destruction of plaintiff's "Counter Freezer" business.

CVII.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, the "International Association," its affiliated associations and members thereof, including the defendants herein, their officers, directors, servants, employees and agents prepared and sponsored legislation and local ordinances or amendments thereto in bad faith to be introduced and sponsored by its members, including the defendants herein, into the law-making bodies of the several states and cities with the apparent purpose and guise of such legislation (40) and local ordinances or amendments thereto, to clarify, unify and establish a standard of sanitary regulations for the manufacture of ice cream, but with the secret and undisclosed unlawful purpose and intent behind such legislation and local ordinances or amendments thereto, and the undisclosed unlawful effect of the provisions of the same being, to destroy or suppress the growth of competition from "Counter Freezers" and making it impossible or practically impossible for prospective purchasers and operators of "Counter Freezers" to enter the field or for operators

and owners of "Counter Freezers" to continue in the field; that the true intent of the defendants, their officers, directors, servants, employees and agents in preparing and sponsoring such legislation and local ordinances or amendments thereto is shown in the following situation, among others, that as soon as they succeeded in introducing the same, they used this pending legislation, or pending local ordinance, or pending amendment or amendments thereto as a threat, club or coercive measure to delay and defeat the purchase of "Counter Freezers" including "Counter Freezers" manufactured by plaintiff, and eliminate the continued use and competition of "Counter Freezers"; that the bad faith of the defendants, their officers, directors, servants, employees and agents in preparing and sponsoring such legislation and local ordinances or amendments thereto is shown by the situation, amongst others, that the proposed provision that all ice cream mix must be pasteurized at the point of freezing—a requirement which would work an extreme hardship on "Counter Freezer" operators and owners, was "soft pedalled" and laid aside, because it was found that many members of the "International Association," including the defendants herein, could not meet this regulation without heavy expense; and in the additional situation, amongst others, that in their zeal to secure stringent regulations which could be met by members of the "International Association," including the defendants here, but not by the "Counter Freezer" operators and owners, members of the "International Association," including the defendants herein, presented bills, ordinances or amendments thereto, to their respective law-making bodies which were defeated because of their unnecessarily drastic provisions, with the result that the "International Association" began advising its members, including the defendants herein, to avoid setting up these specific drastic regulatory provisions in proposed statutes, ordinances or amendments thereto; but rather to make these proposed enactments general in nature with the provision that a supervisory authority set up appropriate regulations for

the carrying out of the act, ordinance or amendment, with (41) it being secretly pointed out to the members of the "International Association," including the defendants herein, that the chances of getting drastic regulations directed against the installation, use and operation of "Counter Freezers" adopted by such an administrative authority was much better than getting them approved by law-making bodies, all to the detriment and damage of plaintiff's interstate business.

CVIII.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, the "International Association" and its members including the defendants herein, their officers, directors, servants, employees and agents threatened to prepare, introduce and sponsor prohibitive state legislation, local ordinances and amendments thereto, as set forth in paragraph "CVII" above, if prospective purchasers and operators of "Counter Freezers" do not desist from purchasing said "Counter Freezers" and operators and owners of "Counter Freezers" do not desist from using and operating said "Counter Freezer," all to the damage of this plaintiff.

CIX.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, legislation and regulations were proposed in the various municipalities, cities and states of the United States for the purpose of imposing upon owners of "Counter Freezers" the burden of paying exorbitant license fees for the privilege of operating such "Counter Freezers", all to the damage of this plaintiff.

CX.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the inter-

state commerce of the plaintiff and to make the same effective, the classifications of "Counter Freezers" as manufacturing plants, in accordance with (42) ordinances, regulations, and laws now in effect or being prepared in the various municipalities, cities and states of the United States, require the following: that the owners of such "Counter Freezer" pasteurize the mix at the point of manufacture; use live steam for sterilization and cleansing purposes; maintain a separate freezing room; construct the floors of the freezing room so that the same shall slope to a drain; that the floors of the freezing room be composed of some impervious material such as concrete or tile; all of which requirements were unnecessary for the sanitary operation of the "Counter Freezer" and were proposed or enacted to discourage and did discourage the purchase and operation of such "Counter Freezer" to the detriment and damage of the business of the plaintiff.

CXI.

That in furtherance and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective, the defendants, their officers, directors, agents; servants and employees succeeded in having such legislation enacted as laws in various municipalities, cities and states of the United States, all to the damage of this plaintiff.

* * *

(44) CXVI.

That in furtherance of and in pursuance of said combination and conspiracy to boycott and restrain the interstate commerce of the plaintiff and to make the same effective; and in order to discourage the sale of "Counter Freezers" manufactured by the plaintiff to state institutions, such as hospitals, legislation was proposed to the effect that all subdivisions of the state and all state institutions were to refrain from going into business now operated by private individuals or private institutions, all to the damage of this plaintiff.

## DECREE IN CAROLENE PRODUCTS COMPANY v. EVAPORATED MILK ASSOCIATION, EQUITY NO. 15573 (N. D. ILL. 1937—UNREPORTED).

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| CAROLENE PRODUCTS COMPANY, a Corporation, *Plaintiff* | Equity No. 15573 |
| *v.* | |
| EVAPORATED MILK ASSOCIATION, an Association, et al, *Defendants* | |

DECREE

This cause coming on to be heard on the defendants' motion to dismiss plaintiff's amended bill of complaint,

And it appearing to the Court that said amended bill of complaint charges in substance that the defendants have combined and conspired to restrain the interstate commerce of the plaintiff in violation of the anti-trust laws of the United States; that in pursuance of said alleged conspiracy, and to make said conspiracy effective defendants have disseminated false statements regarding the wholesomeness and healthfulness of plaintiff's product and to the effect that customers and dealers in plaintiff's product are violating the law and will be prosecuted; employed attorneys, agents and others to prepare and cause to be introduced in the legislatures of various States and Congress proposed legislation to prohibit or tax the manufacture and

sale of plaintiff's product; and employed attorneys, agents and others to assist the enforcement officials of various States in maintaining the constitutionality of and enforcing the laws of such States prohibiting the manufacture or distribution of plaintiff's product;

And it further appearing to the Court that the prayer of said amended bill of complaint is that the defendants be temporarily and permanently enjoined from disseminating statements that plaintiff's product is unhealthful, unwholesome or dangerous or deleterious to health or manufactured, shipped or sold in violation of law, and from furnishing or supplying legal assistance to the adversaries of the plaintiff in any suit or action in which plaintiff may be a party and in which defendants are not parties, and from suggesting the introduction of any law or assisting in the passage of any law which would prohibit the manufacture, possession or sale of plaintiff's product or levy a tax thereon;

And the Court having read and considered said amended bill of complaint and the defendants' motion to dismiss, and having heard the arguments of counsel and being advised in the premises.

And it further appearing to the Court:

1. That the said amended bill of complaint does not state a good cause of action in equity against the defendants or any or either of them, or show that the defendants have been guilty of any unlawful acts or misconduct in the premises;

2. That the amended bill of complaint is lacking in certainty and particularity, and the allegations thereof are so vague and uncertain as to fail to state a cause of action against the defendants;

3. That the allegations of said bill of complaint with reference to the defendants' supposed unlawful acts are the conclusions of the pleader, unsupported by statements of ultimate fact;

4. That it does not appear by said amended bill of complaint that the defendants have disseminated or are disseminating false statements concerning the wholesomeness of the plaintiff's product or plaintiff's business;

5. That it appears by the allegations of said amended bill of complaint that plaintiff is engaged in the sale and distribution of filled milk in interstate commerce in violation of federal law and cannot assert its supposed cause of action in this Court for want of equity and unclean hands;

6. That the alleged activities of the defendants in procuring State or local legislation are not unlawful; said activities amount to nothing more than the exercise of the right of the defendants peaceably to assemble and petition the government for a redress of grievances, which right is protected by the First Amendment to the Constitution of the United States; such alleged activities are not prohibited by the anti-trust laws or other laws of the United States of America, and this Court can not take cognizance of the plaintiff's grievances, if any, arising out of the said alleged acts of the defendants;

7. That the alleged activities of the defendants in inciting and assisting administrative and police officials in the enforcement of the laws of the United States and the several States are not prohibited by the laws of the United States; it is the duty of the citizens of the United States to assist police and administrative officials in the enforcement of the laws, and to restrain the citizens of the United States in the fulfillment of this duty would be against public policy and beyond the powers of this Court.

8. That sponsoring legislation and inciting administrative officials to do what must be taken as their duty cannot be an actionable wrong and the fact that these things might be done in furtherance of a combination to restrain interstate commerce would not make them actionable.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's bill of complaint and amended bill of complaint heretofore filed in this cause be and the same are dismissed for want of equity at plaintiff's costs.

ENTER:

HOLLY
Judge

OFFICE COPY

VOLUME II

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1960

## No. 50

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

*vs.*

NOERR MOTOR FREIGHT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1960
CERTIORARI GRANTED APRIL 18, 1960

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## AMERICAN HOME DEPARTMENT

NEW YORK STATE FEDERATION OF WOMEN'S CLUBS, INC.
*Organized 1894*

MRS. WILLIAM H. GOLDING, President

CHAIRMAN
Mrs. John Weinstein
272 Hewes Street
Brooklyn, N. Y.

VICE CHAIRMAN
Bessie Q. Mott
Woodstock Hotel
127 West 43rd Street
New York, New York

You are cordially invited to a Forum to discuss
The Effect of Taxes on the American Home

with: Mrs. J. L. Blair Buck
President of the General Federation of Women's Clubs

Mrs. William H. Golding
President of New York State Federation of Women's Clubs

Mrs. Elizabeth Harrison Walker
Public Relations Consultant on Programs of Economic Education

Mrs. Edward M. Boyne
President of New York State League of Women Voters

Mrs. Oliver Olsen
President of the Queensboro Federation of Mother's Clubs

Mrs. Louis Steiger
Vice-President of the New York City League of Women Voters

Mrs. Harry E. Crum
President of the New York City branch, American Association of University Women

Miss Edith F. Gordon
Second Vice-President of Business and Professional Women of the State of New York

who will question the tax experts:

Dr. Harley Lutz
Past President and Director of the National Tax Association and Tax Consultant to the National Association of Manufacturers

Mr. George L. Nichols
Chief of Research for the Citizens Public Expenditure Survey and Editor of "New

EXHIBIT P-16G

# EMPIRE STATE TRANSPORT LEAGUE

ELEVEN NORTH PEARL STREET
ALBANY, N. Y.

August 14, 1950

CROMWELL WOODWARD, Chairman
Utica, N. Y.

E. L. Torbert
Syracuse, N. Y.

Norman J. Gould
Seneca Falls, N. Y.

Earl J. Colwell
Hudson, N. Y.

R. A. Cooley
Buffalo, N. Y.

C. R. Wycoff, Jr.
Buffalo, N. Y.

A. F. Crone
Buffalo, N. Y.

John Tritten
Utica, N. Y.

Charles J. Peters
Utica, N. Y.

Neil O. Sheldon
Schenectady, N. Y.

H. C. Richter
Schenectady, N. Y.

Mills Ten Eyck
Schenectady, N. Y.

Charles W. Coneway
Schenectady, N. Y.

J. W. Biggs
Rochester, N. Y.

Dr. Adrian Buyse
Rochester, N. Y.

Dear Sheriff:

Public interest in the Van Cleef Act, which is intended to protect public roads from misuse by illegal commercial carriers, is growing daily. At the recent convention of municipal police chiefs in Rochester, Assemblyman Leo Noonan explained the importance of the bill and how it can be employed by local constabulary as well as by the state police.

This act, which was passed at the last session of the assembly, brings New York State's laws governing the trucking industry more in line with many other states confronted with deteriorating highways resulting from overloaded trucks. The bill enables any law enforcer in the state, such as village or town police, to apprehend big trucks for a weight check and issue summons in case of violations.

In view of the widespread concern evidenced by public officials, taxpayers and law enforcers over the ever-increasing highway problems, the Empire State Transport League is sending you the attached enclosure reporting Assemblyman Noonan's address before the chiefs of police in New York.

The beneficial results to the state highway system from full enforcement of the Van Cleef Act seem obvious to those concerned with transportation problems. Today there are more than 485,000 trucks registered in our state. Many thousands more from out-of-state daily travel over the 102,000 miles of roads in New York. Only with the cooperation of all agencies of law enforcement will it be possible to bring order into the complex highway problem in New York and thus save the state's greatest capital investment from destruction.

Sincerely,

Cromwell Woodward
Chairman

EXHIBIT P-30

EXHIBIT P-31

For release in papers of WEDNESDAY, August 8, 1951, and thereafter.

From:
EMPIRE STATE TRANSPORT LEAGUE
11 North Pearl Street
Albany, N. Y.

## NINE STATES FOLLOW NEW YORK'S APPROACH TO ROAD USER TAXES

ALBANY—Nine widely scattered States have ordered surveys of their highway tax programs in line with legislation passed in New York State last year pioneering the application of user benefits to highway taxes.

These studies were reported in a survey just completed and published by the National Highway Users Conference. Most of the study groups, the conference stated, have been ordered to submit recommendations not later than the meetings of the States Legislatures in 1953.

The 1950 law passed in New York aroused national interest because of its usage of direct measurement of mileage and weight of vehicles as a gauge for license fees. This displaced the older system under which heavy commercial trucks paid very little more in taxes than passenger cars, light delivery vehicles and farm trucks.

The New York law was expected, according to official estimates, to yield an additional $20,000,000 a year to help finance the restoration of highways that had been badly worn by the increasing amount of heavy traffic using them.

Since every state shares with New York the problem of highways damaged out of all proportion to normal wear by the lifting of truck weight restrictions in World War II, the New York legislation has been termed by many public groups a model approach to this question.

According to the National Highway Users Conference, official surveys of this question dealing with "taxation of motor vehicles, highway construction and truck weights" have been authorized by State Legislatures to date, as follows:

CALIFORNIA—Studies of the development of "efficient, economical and adequate highways," with specific direction

for studies of alternate methods of financing the highway modernization program and of taxing heavy commercial vehicles equitably.

—2—

CONNECTICUT—Study of highway taxation and the use of highways by all kinds of vehicles.

MAINE—Study of the entire problem of truck taxation.

INDIANA—Adequate and conclusive tests of different types of paving materials, including the cost, durability and upkeep requirements of various types under both automobile and heavy truck usage.

MICHIGAN—Studies of highway construction and deterioration, combined with investigations of the most equitable method of taxing trucks in relationship to their earnings from usage of the highways and damage done by them to highways.

MISSOURI—Studies similar to those ordered in Michigan, with this report ordered completed by Sept. 1, 1951.

NEBRASKA—Studies of methods of raising revenues for highways.

OHIO—An exhaustive study of the whole highway problem, with special attention to the use of highways by commercial trucking interests and the contributions that these commercial users should make toward construction and maintenance.

OREGON—Studies of highway needs and the effect of recent motor taxation on the motor transportation industry, as well as the communities served by this industry.

This resume by the National Highways Users Conference dealt only with specific studies ordered up to the end of July by State Legislatures. Other reports have indicated that many additional States also are attacking the highway user-benefit tax question by other means, particularly since highway deterioration has been one of the major topics considered by the last two annual Conferences of State Governors.

EXHIBIT P-32

EMPIR. TATE TRANSPORT LEAGUE

ELEVEN NORTH PEARL STREET
ALBANY, N. Y.

CROMWELL WOODWARD, Chairman
Utica, N. Y.

E. L. Torbert
Syracuse, N. Y.

Norman J. Gould
Seneca Falls, N. Y.

Earl J Colwell
Hudson, N. Y.

E. A. Cooley
Buffalo, N. Y.

C. R. Wycoff, Jr.
Buffalo, N. Y.

A. F. Crone
Buffalo, N. Y.

John Tritten
Utica, N. Y.

Charles J. Peters
Utica, N. Y.

Neil O. Sheldon
Schenectady, N. Y.

H. C. Richter
Schenectady, N. Y.

M. Ten Eyck
Schenectady, N. Y.

Charles W. Coneway
Schenectady, N. Y.

J. W. Biggs
Rochester, N. Y.

Dr. Adrian Buyse
Rochester, N. Y.

June 20th, 1952

Dear Sir:

In accordance with our policy of encouraging an enlightened public opinion in transportation matters, I am enclosing a reprint from a recent issue of ENGINEERING NEWS-RECORD on the Maryland Road Test.

The findings of this test conclusively prove that single axle weights of 22,400 pounds, such as are permitted in New York State, cause six times as much damage to the roads as single axle weights of 18,000 pounds. The 18,000-pound axle limit has been recommended by the U.S. Bureau of Public Roads, the Council of State Governments and the American Association of State Highway Officials. It is already in effect in 34 states at the present time.

Sincerely,

/s/. CROMWELL WOODWARD
Cromwell Woodward

EXHIBIT P-33

FOR IMMEDIATE RELEASE

FROM: Empire State Transport League
11 North Pearl Street
Albany 7, New York

[Handwritten notation—*File*]

## ROADS FAILING UNDER BIG LOADS HARPER'S REPORTS

### Auto Safety Official Describes Highway Crisis In Sept. Issue

The nation's once matchless 50 billion-dollar highway system is "progressively going to pieces at a staggering rate," an article in the September issue of Harper's Magazine warns.

Specifically, author Myron Stearns, associate of the Automotive Safety Foundation, charges: "For twenty years we have been going uninterruptedly backward, to the tune of fifteen or twenty thousand miles of highway a year on the average. In round numbers, we now have 350,000 fewer miles of up-to-date roads than we had twenty years ago."

Stearns cites an estimate of the Bureau of Public Roads that 60 billion dollars stretched over 15 years would be required to bring the nation's roads up to standard, while estimates of State Highway Commissioners for repairs and improvements needed immediately total $41,144,630,620.

"In New York State alone," he declares, "it is estimated that $890,000,000 would be required to restore the state highway system to the point of efficiency it reached in 1930."

Blame for rapid deterioration of highways is placed by the author chiefly on the greatly expanded use of heavy trucks. Pointing out that between 1929 and 1949 truck mileage rose from 12 billion to 45 billion and loads rose from 14 billion to more than 100 billion ton-miles, Stearns asserts:

"Loads that are no more than half what a concrete highway can carry do little damage; if they are more than that, the pavement wears only one-tenth as long."

(more)

In illustration, the article provides the example of a two-lane Louisiana highway where "the pavement on one side has gone out completely, while on the other side it is still good. Reason: gravel trucks going to a quarry are empty when traveling in one direction, but are heavily loaded on the beaten side." Stearns also quotes Pennsylvania officials to the effect that a truck carrying an illegal overload of 43 tons did an estimated $15,000 damage to pavements on a single trip.

To prevent needless and costly destruction of highways, Stearns urges as one major measure that laws regulating truck weights be stringently enforced in all the states. "Overloads, far beyond the allowed limit, are doing the most damage to existing roads," he charges. "An Oklahoma weight check showed that more than a third of all trucks were (illegally) overloaded. Identical results were secured in Indiana."

Next in line, he continues, comes increased truck taxes: "Obviously, truck owners must be expected to pay their full share of highway use and highway destruction. So far they have not come even reasonably close to it."

As a case in point, Stearns refers to a Michigan study which shows that in 1946 railroads within the state did $148,000,000 of business on an investment of $690,000,000, while truckers took in $152,000,000 on an investment of $60,000,000. He adds that a newspaper investigation in Illinois last year shows that 17,000 trucks did most of the damage to highways in the state, while paying only a tenth of the highway revenue.

"We are running behind heavily in our highway upkeep," the Harper's article concludes. "The most direct and least expensive way to raise the necessary money—aside from truck regulation and fair fees for truckers—is through whatever gas tax may be necessary. It will hurt."

EXHIBIT P-39

For release in papers of
Thursday, December 14, 1950

FROM: Citizens' Tax League
16 State Street
Rochester, New York

[Handwritten notation—*P39*]

## CAR, FARM TRUCK OWNERS PAY TOO MUCH ROAD TAX

### Highway Tax Study Shows Light Vehicle Charges Are $523,000 Too High In Oneida County

ROCHESTER—Passenger car and farm truck owners in Oneida County pay over $523,000 a year more than their fair share in license fees on their vehicles, a study of the recently completed "Report on Highway Taxation and Finance in New York" reveals.

Each typical farm truck owner pays $12 more than he should when he buys his $27. license tag, and the average size 3,100 pound passenger car's $15.50 tag represents an over-charge of $6.41 when measured by fair standards of highway use and benefits, the report shows. There are more than 54,000 passenger cars and about 2,600 farm trucks in Oneida County.

The highway tax report, now under study by the Joint Legislative Committee on Highway and Canal Finances, was made by the independent finance consultants, Griffenhagen & Associates, Inc. It proposes adjusting license fees of all vehicles according to the use, measured in ton-miles, that each class of car and truck makes of the road facilities in the state.

While passenger car and lightweight truck license fees should be reduced, heavy over-the-road commercial trucks should pay six times more than they now contribute, according to the study. These adjustments in license taxes are based on the assumption that highway expenditures will increase at a normal rate of growth and that the gas tax will stay at four cents per gallon.

Emphasizing the need for highway tax reforms in the state, the report reveals that the typical farm truck payment in New York is higher than any state in the nation except New Hampshire and Ohio. The same truck pays a license fee averaging only $17 in the ten leading farm states of the nation, it is shown.

Meanwhile, the heaviest combination over-the-road truck licensed in New York pays less than one-third as much as the same truck would pay in the ten top agricultural states. New York gets only $140 from such trucks, while the leading farm states charge an average of $548. The national average is $521.

Other facts revealed in the report, the first of its kind in the state to include costs and charges for all the 1,620 government units administering streets, roads and highways, are:

1) Combined license fees and motor fuel taxes for a passenger car are four times as great as heavy truck payments on a ton-mile basis.

2) Passenger cars pay 23 cents per 100-ton-miles and heavy trucks pay only five cents.

Mrs. Harry E. Crum
President of the New York City branch, American Association of University Women

Miss Edith F. Gordon
Second Vice-President of Business and Professional Women of the State of New York

who will question the tax experts:

Dr. Harley Lutz
Past President and Director of the National Tax Association and Tax Consultant to the National Association of Manufacturers

Mr. George L. Nicnols
Chief of Research for the Citizens Public Expenditure Survey and Editor of "New York State Taxpayer"

Mr. Thomas S. Holden
President of F. W. Dodge Corporation and Member of Committee, Business Statistics, Chamber of Commerce, USA

On Wednesday, Feb. 1, 1950
Hotel Astor, South Garden
:30 p.m.
Tea will be served
RSVP

EXHIBIT P-166

379b

EXHIBIT P-40

For release in newspapers of Thursday, November 8, 1951

FROM: Citizens Tax League
421 Exchange Building
16 State Street
Rochester, New York

Robert Menzie, Exec. Secy.
Phone: LOcust 3457

Once far behind most of the country in fair distribution of road taxes between motorists and heavy truckers, New York now has a squarer deal than 44 other states, a tax group reported today.

The Citizens' Tax League of New York said a survey shows that only three states give motorists a better break. They are Tennessee, Idaho and Oregon.

Under a tax schedule passed by the 1951 New York Legislature, big truck owners pay three-fifths of what motorists pay in proportion to the weight and mileage of their vehicles. Under the old law it was only a fourth.

Registration fees, gasoline taxes and the new weight-distance levy cost a 30-ton trailer truck operator slightly more than 14 cents each 100 ton-miles of highway use, the survey shows. A light automobile costs nearly 24 cents a 100- ton-miles and a heavy one nearly 22. (A ton-mile represents the movement of one ton over one mile.)

The weight-distance levy, a comparatively new technique in highway financing, is chiefly responsible for tipping the tax scales into more even balance between automobiles and trucks that weigh fifteen to twenty times more. The new type tax was pioneered by Oregon and this year Idaho, like New York, adapted it to its particular road cost problems.

The League's report was based on facts and figures obtained from the U. S. Bureau of Public Roads, and the New York State Joint Legislative Committee on Highways,

Canals and Revenues, which conducted an extensive investigation into highway-use taxes in all 48 states.

The report shows that operators of heavy trucks pay less than motorists in every state. The national average for a 30-ton truck is 12.40 cents per 100 ton miles, 14.70 cents for one of 20 tons, 32.5 cents for a heavy sedan and 34.39 cents for a light one.

Taxes run about the same, on the ton-mile basis, on vehicles up to 16,000 pounds loaded weight, then drop sharply as the trucks get heavier. Top levies are imposed on a 3-ton pick-up truck, the survey shows.

Tennessee has the nation's fairest road-use taxation, comparing passenger cars with heavy trucks, while Rhode Island has the least fair.

North Carolina levies the top taxes on a 20-ton trailer truck, according to the survey, while New Jersey has the nation's lowest road fees.

The motorist is hardest hit in Mississippi, where he pays more than half a dollar for each 100-ton-miles. Kansas, Kentucky and West Virginia also are expensive states for auto owners. New Jersey is the cheapest state, taxwise, in which to own a car.

The tax group explained that its ton-mileage and weight-distance tax calculations took unloaded truck mileage into account.

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EXHIBIT P-41

FOR RELEASE Thursday, July 17

FROM: Robert J. Menzie
Executive Secretary
Citizens Tax League
16 State Street
Rochester 14, N. Y.

## HIGHWAY USE TAXES COSTLIER TO AUTOS THAN HEAVY TRUCKS

ROCHESTER, N.Y., July 17—Road taxes in every state are higher on automobiles and small trucks than on heavy trucks. Nationally, automobile owners and light-truck operators have to pay more than two and a half times as much for the use of the highway as the owners of top-weight trailer-trucks.

This situation was disclosed today following completion of a nation-wide survey conducted by a New York tax group, the Citizens Tax League.

The survey showed that state road-user taxes and property taxes cost the owner of a 3450-pound automobile an average of 34.6 cents for each 100 ton-miles of road use as against 12.5 cents per 100 ton-miles for the owner of a 60,000-pound trailer-truck.

The survey also showed the same levies average 36 cents for the light panel and pick-up trucks generally used by farmers and local merchants.

Robert J. Menzie, executive secretary of the New York tax group, explained that a ton-mile is the movement of one ton over one mile of highway. He said the ton-mile unit "has become the generally accepted measurement of highway use and, therefore, the key to the fairness of highway taxation."

Fairest highway taxation in the nation is in Tennessee, the survey showed, where the heaviest trailer-trucks pay almost 80 per cent of what the motorists pay for each 100 ton-miles of road use. Unfairest is in Rhode Island, where the highway freighters pay less than 20 per cent.

Citing recent truck-tax hikes in nearly a dozen states, Menzie said, "There is a growing sentiment throughout the

nation—as the public becomes more aware of these inequities—that over-the-road truckers, now a major part of American business, should contribute a reasonable share of the costs of our highways."

He said the state with the lowest truck taxes is New Jersey, which collects 5.6 cents per 100 ton-miles from the owner of a 30-ton trailer-truck. Highest is South Carolina's 19.1 cents.

Most expensive state for motorists is Mississippi, which charges the owner of the average auto 56.2 cents for each 100 ton-miles of road use. New Jersey is again the cheapest, at 16.9 cents.

The survey also showed that Massachusetts has the highest, and Wisconsin the lowest taxes on light panel and pick-up trucks.

The total cost figures, Menzie explained, consist of gasoline taxes, registration fees, special motor carrier taxes and local property taxes. He said these charges have been compiled by the U.S. Bureau of Public Roads and the New York State Joint Legislative Committee on Highways, Canals and Revenues.

EXHIBIT P-64

NEW JERSEY AUTOMOBILE OWNERS, INC.
Incorporated 1938

155 EVERGREEN PLACE [Emblem] EAST ORANGE, N. J.
ORange 2-0416

Robert A. Fox
Executive Secretary

—OFFICERS—
James L. Macwithey
President
Frederick D. Stelljes
Executive Vice-President
Sigfrid Lonegren
Vice-President
William C. Moore
Vice-President
Frank W. Maxwell
Vice-President
Robert A. Fox
Secretary-Treasurer

—DIRECTORS—
Lawrence J. Dwyer
Catesby L. Jones
Victor Mosley
John A. Ward

Jules Tepper
Counsel

February 25, 1951

Dear Editor:

We realize that you have little interest in a interchange of letters betwen this organizatio and another newspaper. However, it is possibl that the same charges have been sent to you We, therefore, attach a copy of our letter to th Editor of the New Brunswick Home-News. Thi is so that you will have the facts at hand.

Sincerely,

Robert A. Fox, Secretary
NEW JERSEY AUTOMOBILE OWNERS, Inc

encl.

NEW JERSEY AUTOMOBILE OWNERS, INC.
Incorporated 1938
155 Evergreen Place [Emblem] East Orange, N. J.
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Executive Secretary

—Officers—

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Frank W. Maxwell
Vice-President

Robert A. Fox
Secretary-Treasurer

—Directors—

Lawrence J. Dwyer
Carsley L. Jones
Victor Mosley
John A. Ward

Jules Tepper
Counsel

February 26, 1951

Editor
The Home-News
New Brunswick, New Jersey

Dear Sir:

I am extremely sorry that we did not know until last Friday of your editorial of February 7th in which you ask about the origin and membership of the New Jersey Automobile Owners, Inc. We are glad to do as you suggest: "to tell the public something about its membership, its finances, and its sources of income."

These data have already been made public from time to time and are on file with the Secretary of State. For your information we enclose a copy of our last financial statement which we previously sent to you when it was first audited. While there are some minor errors in the Dun & Bradstreet report on the NJAO, we are attaching a copy issued largely as the result of inquiry made by certain truckers.

Founded in 1938, to oppose arbitrary restrictions and taxes, the New Jersey Automobile Owners, Inc., has consistently stood for fairer treatment of the motorist. Like almost every other automobile group throughout the country, the Auto Owners has, over the past few years, taken an active interest in the problems created by heavy trucks.

The New Jersey Motor Truck Association has attacked a folder issued by us. This folder is merely a reprint of chapter VI of the Fifth Report of the Commission on State Tax Policy. The text was reprinted exactly as it appeared in the original report with the exception that all registration fees were adjusted upward to give effect to Assembly Bill 3.

We are enclosing a copy of the booklet so that you may point out to Mr. Herrman two important facts which he apparently failed to read: 1) that the increased registration fees for trucks, passed by the 1950 Legislature, are included. They can be found on Table 34, and Table

87; (2) that the summary clearly states that the $220 annual registration fee is for a 21½ ton tractor-trailer combination. This type truck which is nearly 10 tons lighter than the heaviest legal vehicle in New Jersey, was used in the survey made by Griffenhagen & Associates. Both of these "errors" alleged by Mr. Herrman are deliberate attempts to becloud the important issue: that New Jersey, despite its heavy truck traffic, ranks low in revenue from big trucks.

February 26, 1951 —2

It is no surprise that the trucking spokesman failed to inform you of the true nature of the folder. But it is somewhat surprising that so well-informed a publication as yours did not recognize it. We are attaching a full copy of the State Tax Policy report exactly as it was submitted to the Governor and Legislature.

It is obvious that some segments of the trucking interest are endeavoring to hide their own shortcomings. Instead of presenting arguments to dispute the studied conclusions of tax experts in New Jersey and scores of other states, they set up the railroads as a straw man.

Do the truckers challenge the integrity of Governor Driscoll for his support of last year's legislation to reduce axle loads?

Or the motives of Governor Dewey with his proposal for a ton-mile tax on heavy trucks?

Or Governor Lausche of Ohio for his ringing demand for higher fees for heavy trucks?

And would the truckers attack the credentials of the Governors' Conference which so strongly urges a ton-mile tax as a key move toward more equitable highway taxation?

Or the entire membership of the American Association of State Highway officials who are unanimous in their plea for an 18,000 pound axle load to save our highways?

Among nearly 1000 members of the New Jersey Automobile Owners are many "known and respected people," to use your descriptive phrase regarding trucking association personnel. Our president is James L. Macwithey, vice-president of the Rubberset division of Bristol-Myers. He is former chairman of the East Orange City Council and now is chairman of the Roads Committee of the council. Among our vice presidents are such well-known business and civic leaders as William Moore, vice president, General Adjustment Bureau of New York; Sigfrid K. Lonegren, president of a nationally known wallpaper concern; Lawrence A. Dwyer, former head of the state organization of the Knights of Columbus.

At least three of our directors should be familiar to you: Cates Jones, former mayor of Bernardsville; John A. Ward, former mayor

Burlington; and Victor Mosley, former president of the Investment ankers Association. All three have been active civic leaders in many, any state-wide organizations. A recitation of members would add any men and women of similar experience and interest.

As to our finances, I wish we were as affluent as you represent us. ur fiscal year does not end until March 31, so we are unable to give p-to-date, audited figures. However, we are enclosing the report which e previously sent you. The New Jersey Automobile Owners, Inc., is nly able to operate because of earnest efforts of many volunteer work- rs who have contributed freely of their time and funds. Our annual



udget has come from three sources: membership dues, contributions, nd the sale of literature.

We draw upon many sources for factual material. These include the Bureau of Public Roads, various official state highway organizations, ailroads, and even trucking and automobile groups.

During the past several years I have personally talked before nearly hundred groups around the State. Many times listeners have asked bout "railroad affiliation." I think I can confidently say that I an- wered their questions and allegations to the complete satisfaction of very member of the audience. I have always found that true facts peak louder than irresponsible accusations.

The most stinging indictment of certain elements of the trucking ndustry is to be found in the Council of State Government's report Highway Safety and Motor Truck Regulation." We also enclose a copy f this for your perusal.

As you can see from this report, the problem of heavy trucking is ationwide. It will not be solved or removed by the ancient and dis- redited trucking charge of "railroad propaganda." Whenever we can rovide facts of interest to you and other members of the press in the tate, we shall continue to do so.

To sum up—this isn't a fight between the truckers and the railroads, s the long-haul truckers would have you believe. This is a movement o protect one of our state's greatest investments—its highways. This a taxpayers' struggle to prevent a greater burden of highway expen- itures being thrust on our shoulders, while out-of-state commercial arriers ride free. The New Jersey Automobile Owners, Inc., is not, ever has been, and has no intention of being a lobbying group or front" for any interest except the taxpaying motoring public.

Sincerely,

Fred D. Stelljes, vice president
NEW JERSEY AUTOMOBILE OWNERS, INC.

ncls.

EXHIBIT P-66

STELLJES TALK 10/24/51

FINANCING NEW JERSEY'S HIGHWAYS

ALL OF US HERE HAVE HEARD ABOUT NEW JERSEY'S HIGHWAY PROBLEMS. WE HAVE HEARD THAT OUR ROADS ARE BREAKING UP ALMOST AS FAST AS THEY CAN BE REPAIRED. WE READ IN THE NEWSPAPERS OF BRIDGES CRACKING UNDER THE STRAIN OF HEAVY VEHICLES. WE SEE FIRST HAND THE DENSE TRAFFIC ON OUR ROADS TODAY. ALL OF US HAVE HUNTED FOR PARKING SPACE IN OUR SHOPPING CENGERS. ALL OF US HAVE CREPT ALONG MAIN STREETS, HELD UP BY TRAFFIC LIGHTS, POLICEMEN, AND HUGE TRACTOR TRAILERS. AND ALL OF US HAVE DRIVEN ON OUR STATE HIGHWAYS AND KNOW THE ASTOUNDING INCREASE IN TRAFFIC AND TRAFFIC CONGESTION.

THIS WEAR AND TEAR ON OUR ROADS MEANS THAT MILLIONS OF DOLLAR OF TAXPAYERS MONEY MUST BE USED EVERY YEAR TO REPAIR OUR HIGHWAYS. AND, WORSE YET, THERE IS NOT ENOUGH MONEY LEFT OVER TO CARRY OUT THE TREMENDOUS NEW CONSTRUCTION WHICH IS SO DESPERATELY NEEDED. THE NEW JERSEY STATE HIGHWAY DEPARTMENT HAS PLANS WHICH CALL FOR THE EXPANSION OF OVER $8000,000,000 FOR CONSTRUCTION ALONE: $80,000,000 A YEAR FOR THE NEXT TEN YEARS JUST TO BRING OUR HIGHWAYS UP TO DATE. THAT IS MORE THAN THREE TIMES AS MUCH MONEY AS IS NOW BEING SPENT. THAT $800,000,000 DOES

MORE

NOT TAKE INTO ACCOUNT THE MILLIONS MORE NEEDED FOR LOCAL STREETS AND COUNTY ROADS. IT IS NO EXAGGERATION TO SAY THAT NEW JERSEY HAS A BILLION DOLLAR HIGHWAY PROBLEM.

—2—

THE REAL PROBLEM, THE BASIC NEED IN NEW JERSEY, IS TO FIND A FAIR AND WORKABLE PLAN FOR FINANCING THIS TREMENDOUS SUM.

THERE IS A SOLUTION THAT WILL GO FAR TO SOLVE THIS PROBLEM AND ENABLE US TO PLACE OUR HIGHWAYS ON A SOUND FINANCIAL BASIS—THIS IS A PLAN THAT WILL RAISE UPWARDS OF $20,000,000 WITHOUT HARDSHIP ON THE MAJOR MAJORITY OF HIGHWAY USERS IN NEW JERSEY. SUCH A SUM WOULD SOLVE MOST OF THE PROBLEMS FACING OUR STATE HIGHWAY OFFICIALS TODAY. THIS SUBJECT—THE FINANCING OF OUR ROAD SYSTEM—IS WHAT I WISH TO DISCUSS WITH YOU TONIGHT

PAUSE

BECAUSE OF ITS POSITION, NEW JERSEY CARRIES THE GREATEST HIGHWAY TRAFFIC IN THE WORLD. MUCH OF THE INDUSTRIAL AND FARM GOODS PRODUCED IN THE SOUTH, MID-WEST AND WEST PASSES OVER NEW JERSEY ROADS. TO INSURE RAPID, ECONOMICAL PASSAGE OF SUCH PRODUCTS, TRAFFIC MUST MOVE FREELY. IF NEW JERSEY ROADS ARE BREAKING UP, IF THEY ARE CROWDED AND CONGESTED, THIS IS NOT POSSIBLE. SO, I THINK THE BASIC HIGHWAY PROBLEMS ARE:

1) HOW TO MAINTAIN OUR ROADS AND

2) HOW TO GET THE MONEY TO DO THE JOB.

MORE

PAUSE

SOME OF THE MOST IMPORTANT MEN IN NEW JERSEY TODAY ARE THE HARD-WORKING ENGINEERS AND SKILLED ROAD TECHNICIANS WHO DOCTOR OUR PAVEMENTS AT THE FIRST SIGNS OF ILLNESS:—SUCH AS CRUMBLING SHOLDERS



CRACKED SLABS, SCALING, PUMPING OF THE ROAD SUB-SOIL, AND SO FORTH. BUT THE ONLY REAL CURE FOR THESE ROAD AILMENTS IS MONEY.

NOW WE CANNOT AFFORD TO COMPLETELY REBUILD OUR ROADS TO SUPPORT TODAY'S GIANT TRACTOR-TRAILER TRUCKS AND THE VASTLY INCREASED NUMBER OF VEHICLES ON OUR HIGHWAYS; THAT WOULD BE A STAGGERING AND AN IMPOSSIBLE JOB. BUT WE CAN PROTECT WHAT WE HAVE TODAY. WE CAN LIMIT THE TREMENDOUS LOADS THAT TRUCKS CARRY ON OUR HIGHWAYS.

I AM SURE THAT MOST OF YOU REMEMBER 1949 WHEN THE LEGISLATURE PASSED A BILL TO LIMIT THE AXLE LOADS OF BIG TRUCKS TO 22,400 POUNDS. WE OF THE NEW JERSEY AUTOMOBILE OWNERS THINK THAT THIS FIGURE WAS FAR TOO LIBERAL TO INSURE ADEQUATE ROAD PROTECTION. WE THINK THE STATE SHOULD ADOPT THE STANDARD OF 18,000 POUNDS PER AXLE. THIS IS THE STANDARD IN 34 STATES AND IS RECOMMENDED BY EVERY COMPETENT HIGHWAY AUTHORITY. BUT THE TRUCKING INDUSTRY, MORE INTERESTED IN QUICK PROFITS THAN YOUR HIGHWAYS, THOUGHT OTHERWISE. THEY FORCED THE LEGISLATURE TO ADOPT A WEIGHT LIMIT WHICH IS WAY TOO HIGH FOR OUR NEW JERSEY ROADS.

BUT LET'S GET TO THE BIG QUESTION: HOW CAN WE GET THE DOLLARS NEEDED TO MAINTAIN OUR ROADS AT PEAK EFFICIENCY? MANY GROUPS—THE TAXPAYER, THE TRUCKER, THE MOTORIST, THE STATE OFFICIAL—HAVE OFFERED SUGGESTIONS ON HOW THIS CAN BE DONE. I WOULD LIKE TO READ TO YOU WHAT YOUR STATE TAX POLICY COMMISSION HAS TO SAY ON THIS SUBJECT. THIS TAX POLICY COMMISSION IS AN OFFICIAL COMMITTEE HEADED

—4—

BY DR. JOHN SLY, DIRECTOR OF THE PRINCETON SURVEYS. IN ITS FIFTH REPORT TO THE GOVERNOR AND THE LEGISLATURE, THE COMMISSION SAYS:

"... THE COMMISSION RECOMMENDS THE ADOPTION OF A MILEAGE TAX ON ALL MOTOR CARRIERS—COMMON, CONTRACT, AND PRIVATE—WEIGHING OVER 8000 POUNDS, WHICH OPERATE ON THE HIGHWAYS OF THE STATE, WHETHER THEY ARE REGISTERED IN NEW JERSEY OR OTHER STATES."

PAUSE

I WOULD LIKE TO EMPHASIZE THAT THERE ARE TWO BASIC AND VERY IMPORTANT PRINCIPLES IN THIS CHAPTER OF THE COMMISSION'S REPORT. FIRST, THE COMMISSION FAVORS A "PAY—AS—YOU—GO" TAX ON BIG COMMERCIAL TRUCKS. THE PHRASE—"ADOPTION OF A MILEAGE TAX"—MEANS, IN SIMPLE LANGUAGE, THAT A GROSS TON-MILE TAX BASED ON WEIGHT CARRIED AND MILEAGE DRIVEN WOULD BE ASSESSED AGAINST EVERY BIG TRUCK ROLLING OVER OUR HIGHWAYS. AT PRESENT, SOME 15 STATES USE VERSIONS OF THE GROSS TON MILE

TAX IN PROGRAMS TO PROTECT THEIR ROADS AND MAKE THEM REASONABLY SELF-SUPPORTING.

PAUSE

THE SECOND IMPORTANT IDEA EXPRESSED IN THE COMMISSION'S REPORT IS THAT OUT-OF-STATE TRUCKS WILL BE REQUIRED TO CONTRIBUTE TO THE UPKEEP OF OUR ROADS, AND OUR STATE HIGHWAY OFFICIALS TELL US THAT ABOUT 30 PER CENT OF THE TRUCKS ON OUR ROADS BEAR OUT-OF-STATE LICENSE TAGS. AT PRESENT, THESE TRUCKS ARE NOT REQUIRED TO PAY ANY TAXES TO THE STATE OF NEW JERSEY FOR THE USE OF OUR ROADS. THE ONLY MONEY WHICH THESE LONG HAUL TRUCKERS MIGHT PAY IS A FEW PENNIES GAS TAX.

HERE'S WHAT THE TAX POLICY COMMISSION SAYS:

—5—

"SUCH A TAX, YIELDING APPROXIMATELY $9,000,000 WOULD REOMOVE SOME OF THE INEQUITIES OF THE PRESENT STRUCTURE WITH REGARD GO PAYMENTS OF VARIOUS SIZES OF VEHICLES. IT WOULD AVERT FURTHER HIGHWAY INDEBTEDNESS AND IT WOULD ALLOW SOME RELIEF FOR THE GENERAL PROPERTY TAXPAYERS."

THE TAX RATE RECOMMENDED BY THE TAX POLICY COMMISSION IS ONE HALF MILL FOR EACH GROSS-TON-MILE DRIVEN BY A TRUCK WEIGHING OVER 8000 POUNDS. THIS RATE IS EXACTLY ONE HALF THAT OF OREGON'S. IT IS LESS THAN THE RATE IN NEW YORK STATE. AND THE NEW JERSEY AUTOMOBILE OWNERS BELIEVE THAT IT IS ABOUT ONE HALF WHAT IT

SHOULD BE. WE BELIEVE THAT THE TAX SHOULD RAISE $20,000,000 . . . NOT THE $9,000,000 ESTIMATED BY THE COMMISSION.

REMEMBER THIS—MUCH OF THIS TAX WOULD BE PAID FOR BY THE OUT-OF-STATE TRUCKER WHO NOW PAYS NOTHING TO NEW JERSEY. HE DAMAGES OUR ROADS AND GOES OFF "SCOTT-FREE" WHOLE WE, THE TAXPAYERS, THE MOTORISTS, AND TRUCKERS OF NEW JERSEY PAY THE BILLS.

NOW I ASK YOU—DO YOU THINK IT IS FAIR THAT NEW JERSEY, WHOSE ROADS BEAR THE HEAVIEST CONCENTRATION OF HEAVY TRUCK TRAFFIC IN THE WORLD—CONTINUE THIS PRESENT TYPE OF FINANCING? DO YOU THINK IT IS FAIR TO SAY TO THE OUT-OF-STATE TRUCKER: "YOU USE OUR ROADS, YOU WRECK OUR BRIDGES, BUT WE WILL GLADLY PAY THE BILLS?"

GOOD HIGHWAYS RE IMPORTANT TO THE TRUCKING INDUSTRY. THEY MAKE THEIR PROFITS BY FAST DELIVERY, BY MEETING SCHEDULES. THE TRUCKING INDUSTRY HAS MORE TO GAIN FROM BETTER HIGHWAYS THAN ANY



SINGLE GROUP. AND THEY ARE WILLING TO INVEST MORE MONEY . . . IF IT MEANS BETTER HIGHWAYS. THE TRUCKING INDUSTRY IS WILLING TO PAY MORE TAXES ON THE BASIS OF SELF INTEREST. AS JOHN V. LAWRENCE, MANAGING DIRECTOR OF THE AMERICAN TRUCKING ASSOCIATION SAYS: "ABOUT 57 PER CENT OF OUR MAJOR HIGHWAYS MUST BE REPLACED BY 1960."

NOW LET'S SEE WHO IS PAYING FOR THE HIGHWAYS TODAY. MANY OF YOU ARE PROPERTY OWNERS AND PAY TAXES. YOU MAY BE SUR-

PRISED TO KNOW THAT YOUR PROPERTY TAX DOLLARS ARE PAYING A VERY SUBSTANTIAL SHARE OF THE COSTS OF HIGHWAYS. AND YOU ARE PAYING MORE AND MORE EACH YEAR. HERE ARE THE FACTS.

IN 1940, HIGHWAY-USER-TAXES—THAT IS, GASOLINE TAX, REGISTRATION AND LICENSE FEES—PAID FOR 87 PER CENT OF ALL THE NEW JERSEY HIGHWAY EXPENDITURES. THE YEAR . . . 1951 . . . THOSE SAME TAXES WILL PAY FOR ONLY ABOUT 55 PER CENT OF THE TOTAL. IN OTHER WORDS, THE PROPERTY OWNER . . . YOU AND I AND YOUR NEIGHBOR . . . ALREADY THE LARGEST TAXPAYER IN THE STATE, IS NOW PAYING 45 PER CENT OF ALL HIGHWAY COSTS. AND ONLY 10 YEARS AGO WE CONTRIBUTED JUST 13 PER CENT. OR, TO PUT IT THE OTHER WAY, THE PEOPLE WHO ACTUALLY USE THE HIGHWAYS ARE PAYING LESS AND LESS.

IN ADDITION TO THIS, WE FIND THAT THE DISTRIBUTION OF THE MONEY IS OUT OF LINE. IN 1950, TOTAL HIGHWAY-USER REVENUES FOR NEW JERSEY AMOUNTED TO ABOUT $64,000,000 . . . MORE THAN ONE THIRD OF THE STATE BUDGET. OUR COUNTY AND MUNICIPAL GOVERNMENTS ARE RESPONSIBLE FOR 91 PER CENT OF ALL



ROAD MILEAGE IN THE STATE, BUT TO MAINTAIN THESE 25,748 MILES OF PAVING LOCAL GOVERNMENTS RECEIVE ABOUT $15,000,000 IN STATE AID . . . ABOUT 23 PERCENT OF HIGHWAY-USER FEES COLLECTED.

SO LOCAL ADMINISTRATION . . . YOUR TOWN, YOUR COUNTY . . . HAD TO RAISE MORE THAN

$30 MILLION, TAKING IT FROM YOUR PROPERTY TAXES. THAT'S ONLY HALF THE STORY. THE STATE, WHICH HAS THE RESPONSIBILITY FOR ONLY 1,758 MILES OF STATE ROADS, KEPT MOST OF THE MONEY RAISED FROM GASOLINE TAXES, LICENSE AND REGISTRATION FEES . . : ALMOST ALL OF WHICH WAS PAID BY YOU, THE MOTORIST. WHY? BECAUSE—OUR MAIN ROADS ARE TAKING SUCH A BEATING THAT THE STATE MUST SPEND MANY MILLIONS OF DOLLARS KEEPING THESE MAIN ROUTES REPAIRED. THESE ARE THE ROADS THAT CARRY ALMOST 90 PER CENT OF THE OUT-OF-STATE TRUCK TRAFFIC. THE EXPERTS SAY THAT THE MOST LOGICAL ANSWER TO ALL THESE PROBLEMS IS A MILEAGE TAX ON HEAVY TRUCKS . . . A TON-MILE TAX A WEIGHT-DISTANCE TAX—THE TAX IS THE SAME THOUGH THE NAME MAY BE DIFFERENT. IT IS A HIGHWAY USE TAX.

JUST WHAT IS THIS TON-MILE TAX? A TON-MILE-TAX IS BASED ON THE FACT THAT HIGHWAY WEAR IS RELATED TO WEIGHT AS WELL AS TO USE IT IS A YARDSTICK FOR MEASURING THE MOVEMENT OF ONE TON ONE MILE. THE VEHICLE OWNER PAYS IN DIRECT PROPORTION TO THE NUMBER OF TON MILES DRIVEN. FOR EXAMPLE, AN ORDINARY PASSENGER CAR WEIGHING ONE AND ONE HALF TONS AND MAKING A 100 MILE TRIP USES THE HIGHWAYS TO THE EXTENT OF ONE AND ONE HALF TIMES 100 MILES OR 150 GROSS-TON-MILES. A 10 TON TRACTOR TRAILER WITH A 20 TON PAY LOAD, MAKING THE



SAME TRIP, WOULD HAVE A GROSS-TON-MILE INDEX OF 3000—20 TIMES AS MUCH HIGHWAY USE. THE WAY THE STATE GETS ITS MONEY IS THIS:—

EITHER BY TAXING ON THE BASIS OF GROSS-TON MILE USE OR BY SETTING REGISTRATION FEES ON A TON-MILE BASIS.

PAUSE

THE FAIRNESS OF THIS METHOD OF HIGHWAY TAXATION WAS POINTED OUT BY YOUR STATE TAX POLICY COMMISSION. STUDYING THE FACTS, THE COMMISSION FOUND THAT PASSENGER CARS AND SMALL TRUCKS PAY MORE THAN THEIR PROPER SHARE OF HIGHWAY COSTS. APPLYING THE TON-MILE YARDSTICK TO THE 1949 STATE HIGHWAY EXPENDITURES, PASSENGER CAR OWNERS EACH PAID $6.29 MORE THAN THEIR SHARE OF HIGHWAY COSTS. THIS OVERPAYMENT TOTALED $7,070,000.

OWNERS OF SMALL TRUCKS—WEIGHING LESS THAN FOUR TONS—WERE ALSO BEING HOOKED. THE FARMER, THE PLUMER, THE ELECTRICIAN, THE LAUNDRYMAN ALL OVERPAID ANYWHERE FROM $6.86 TO $16.68 EACH .... ON THE BASIS OF HIGHWAY USE.

BUT THE BIG FELLOW—THE TRACTOR-SEMI-TRAILER COMBINATION—GETS MORE OR LESS A FREE RIDE ON NEW JERSEY HIGHWAYS. THE COMMISSION ESTIMATES THAT, ON A TON-MILE BASIS, A BIG TRUCK UNDERPAYS ITS FAIR SHARE OF HIGHWAY COSTS BY AS MUCH AS $451.29 A YEAR. APPLY THAT SUM TO EVEN A SMALL PORTION OF THE STATE'S THOUSANDS OF TRUCKS AND YOU GET AN IDEA OF THE SIZE OF NEW JERSEY'S MISSING HIGHWAY REVENUES.

AS A MATTER OF FACT, THE STATE OF NEW JERSEY RECEIVES LESS REVENUE FROM BIG TRUCKS THAN ANY OTHER STATE. WE ARE AT

THE BOTTOM OF THE LIST IN TRUCK TAXES . . . NO. 48. AND LET ME REPEAT . . . NEW JERSEY HAS THE HEAVIEST TRUCK TRAFFIC IN THE WORLD.

TODAY, OUT-OF-STATE TRUCKERS ARE FINDING OUR MAIN HIGHWAYS TOO CONGESTED AND TOO DAMAGED . . . A SITUATION THAT THEY THEMSELVES CREATED. SO NOW THE BIG TRUCKER TAKES TO COUNTRY ROADS NEVER BUILT TO CARRY SUCH STAGGERING WEIGHTS. I SPENT A GREAT DEAL OF TIME IN SUSSEX COUNTY, AND I CAN TELL YOU THAT THIS HIGHWAY PROBLEM IS VERY SERIOUS UP THERE. FARMERS AND MILK DEALERS MUST HAVE GOOD ROADS TO GET THEIR PRODUCTS TO MARKET, BUT THEY CANNOT DO IT WHEN THEIR ROADS ARE RUTTED AND TORN BY HEAVY COAL TRUCKS FROM PENNSYLVANIA. THE RURAL COUNTIES NEED HELP TO PAY FOR REBUILDING THESE DAMAGED ROADS.

YOU MAY HAVE HEARD THE STATEMENTS THAT THE TRUCKING INDUSTRY PAYS MILLIONS OF DOLLARS IN TAXES . . . TAXES WHICH ACCOUNT FOR 30 PER CENT OF ALL HIGHWAY USER REVENUES. BUT LET'S SEE WHAT THE REAL FACTS ARE: THERE ARE ABOUT 220,000 TRUCKS REGISTERED IN NEW JERSEY. ABOUT 5 PER CENT—15,000 ALL TOLD—ARE BIG GRUCKS . . . TRUCKS THAT WEIGH 12 TONS OR MORE. THESE ARE THE TRUCKS WHICH THE TAX POLICY COMMISSION SAYD ARE NOT PAYING ENOUGH. IN ORDER TO MAKE A GOOD CASE FOR THEMSELVES, THE BING LONG-HAUL TRUCKERS TALK ABOUT ALL TRUCKS. THEY INCLUDE ALL THE SMALL DELIVERY TRUCKS, GOOD HUMOR WAG-

ONS, LOCAL COAL TRUCKS, ETC. WHO DRIVE A FEW THOUSAND MILES ANY YEARS. THEY HAVE ABSOLUTELY NOTHING IN COMMON WITH THE HUGE TRACTOR-TRAILER COMBINATIONS. YET TO COVER UP THEIR OWN FAILURE TO PAY TAXES, THE BIG TRUCKERS SPREAD A TENT OVER THE WHOLE INDUSTRY.

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EVEN MORE TO THE POINT IS THE FACT THAT THE SMALL TRUCKS—ONLY TWO OR THREE TIMES AS HEAVY AS AN AUTOMOBILE—DO NOT DAMAGE HIGHWAYS, THE GIANT TRUCKS, WEIGHING 40, 50, AND 60 THOUSAND POUNDS DO THE REAL DAMAGE. BUT BY TAKING CREDIT FOR THE TAXES PAID BY THE LITTLE FELLOWS, THESE BIG BOX CARS IMPLY THAT THEY PAY NOT ONLY THEIR FAIR SHARE, BUT ALSO PAY FOR ANY AND ALL DAMAGE. IT JUST IS NOT SO.

ACCORDING TO A STUDY MADE BY A NEW YORK LEGISLATIVE COMMITTEE THIS FALL, A 30 TON COMBINATION TRACTOR-TRAILER PAYS NEW JERSEY AN AVERAGE OF $810 A YEAR: $360 FOR REGISTRATION, $450 FOR GAS TAXES. THAT SAME TRUCK IN COLORADO WOULD PAY $2667. . . . IN FLORIDA: $2445; IN ILLINOIS: $1631; IN NEW YORK: $2285. AND RIGHT AT THE BOTTOM: NEW JERSEY: $810.

PAUSE

IT IS EVIDENT THAT . . . . . TAX-WISE . . . . NEW JERSEY HAS NOT RECOGNIZED THE CHANGING CONCEPT OF TRANSPORTATION. HERE IS A VAST, NEW, POWERFUL PROFITABLE AND IMPORTANT INDUSTRY WHICH USES PUBLIC FACIL-

ITIES DAY AND NIGHT. YET WE, AS CITIZENS AND GOVERNMENTS, HAVE NOT YET REVISED OUR TAX STRUCTURE SO THAT THEIR CONTRIBUTE THEIR FAIR SHARE TO THE COSTS OF GOVERNMENT. AND REMEMBER THIS: ANY TAX MONEY FROM HIGHWAY USERS SHOULD BE USED AS AN INVESTMENT IN THE FUTURE . . . AN INVESTMENT IN BETTER HIGHWAYS.

WELL, TO GET BACK TO THE TON-MILE TAX.

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THE TAX POLICY COMMISSION ESTIMATES THAT IT WILL YIELD $9,000,000. WE OF THE NEW JERSEY AUTOMOBILE OWNERS BELIEVE THAT A FAIR TAX SHOULD RETURN AN EXTRA $20,000,000. WHAT SHOULD HAPPEN TO THIS MONEY?

THE TAX COMMISSION HAS TWO SUGGESTIONS:

1) SPEND ONE HALF OF THE MONEY ON STATE HIGHWAYS:

2) USE THE OTHER $4,500,000 EITHER TO REDUCE THE PAYMENTS OF PASSENGER CAR OWNERS OR TO INCREASE STATE AID TO LOCAL GOVERNMENTS TO HELP MEET THE RISING COSTS OF LOCAL ROADS. THERE ARE MANY GOOD ARGUMENTS FOR BOTH OF THESE PROPOSALS.

NEW JERSEY SPENDS AT LEAST $125,000,000 ON ITS ROADS, STREETS, AND HIGHWAYS EVERY YEAR. OUR HIGHWAY USER REVENUES ARE NOW ABOUT $75,000,000. THAT MEANS THAT AT LEAST $50,000,000 OF LOCAL TAXES ARE USED FOR HIGHWAYS. IT POINTS UP WHAT I SAID EARLIER . . . THAT PROPERTY OWNERS ARE FORCED TO PAY A LARGER AND LARGER SHARE OF HIGHWAY

COSTS. THE TRUTH IS THAT UNTIL WE GEG ADDIGIONAL HIGHWAY REVENUES, WE WILL BE DIVERTING TO OUR ROADS MONEY THAT SHOULD BE SPENT FOR LOCAL SERVICES: SCHOOLS, HEALTH, RECREATION, ETC.

THE FAIR THING TO DO IS TO SEE TO IT THAT THE LONG-HAUL TRUCKING INDUSTRY CONTRIBUTES ITS SHARE TO THE COSTS OF LOCAL GOVERNMENT. THESE ARE THE RECOMMENDATIONS OF THE TAX POLICY COMMISSION, THE COUNCIL OF STATE GOVERNMENTS, THE BUREAU OF PUB



LIC ROADS, AND SCORES OF OTHER OFFICIAL GROUPS. THEY ALL FIRMLY BELIEVE THAT THE FAIREST WAY TO SHARE ROAD COSTS IS ON A "USE" BASIS . . . BY A TON-MILE TAX.

PAUSE

WE OF THE NEW JERSEY AUTOMOBILE OWNERS CONSIDER THAT THE LONG HAUL TRUCKING INDUSTRY IS ONE OF THE YOUNG GIANTS OF OUR DAY. EVERY DAY IT IS BECOMING MORE IMPORTANT. BUT THE TIME HAS COME WHEN THE TRUCKING INDUSTRY MUST STAND ON ITS OWN FEET . . . IT CAN NO LONGER ACCEPT A FREE RIDE ON THE PUBLIC ROADS. WITH GOVERNMENT COSTS RISING, WITH DREAMS FOR NEW AND BETTER SERVICES, THE LOCAL TAXPAYERS SHOULD NOT BE ASKED TO CARRY THE LOAD FOR BUILDING AND MAINTAINING OUR HIGHWAYS. THE LONG HAUL TRUCKERS, BOTH WITHIN THE STATE AND FROM WITHOUT, MUST ASSUME A FAIR SHARE OF THE COSTS OF ALL GOVERNMENTAL SERVICES . . . . AND THEY INCLUDE SAFE, STRONG HIGHWAYS.

THE EXPERTS TELL US THAT THE FAIREST, SOUNDEST WAY TO DO THIS IS TO ENACT A TON MILE TAX. NEW JERSEY NEEDS MONEY FOR ITS HIGHWAYS AND ITS GOVERNMENT. THE LONG HAUL GRUCKERS ARE NOT NOW PAYING THEIR FAIR SHARE. WE ASK YOU TO JOIN WITH US IN TELLING THIS IMPORTANT STORY TO YOUR FELLOW CITIZENS. ONLY IN THIS MANNER CAN WE EVER EXPECT TO CORRECT THIS UNFAIR SITUATION. ONLY IN THIS WAY CAN WE HOPE THAT OUR LEGISLATORS WILL DEVISE SOME STATUTE TO REQUIRE BIG OUT-OF-STATE TRUCKERS TO PAY THEIR SHARE OF ROAD COSTS AND GOVERNMENT SERVICES. THEN, PERHAPS, WE CAN MODERNIZE OUR TAX METHODS USED TO FI-



NANCE OUR HIGHWAYS.

WE BELIEVE THAT THE FAIR WAY, THE SOUND WAY, IS TO ADOPT A GROSS-TON-MILE TAX. WE BELIEVE THAT THIS WILL MAKE CERTAIN THAT THE PEOPLE WHO USE OUR HIGHWAYS FOR PROFIT WILL PAY THEIR FAIR SHARE OF HIGHWAY COSTS. THESE ARE THE FACTS . . . . . WE HOPE YOU WILL AGREE THIS IS THE SOLUTION.

EXHIBIT P-67A

[Handwritten notation:

*New Jersey Herald*
*Sussex County Independent*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## SPARTA ROTARY CLUB HEARS HIGHWAY COST PROBLEMS DISCUSSED

### F. D. Stelljes, Auto Club Exec, Cites Damage by Trucks, Asks Tax Revision

The immediate need for revising present highway user tax methods was stressed today (September 18) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., in a luncheon address before the Sparta Rotary Club at the Manor Farms.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Rotarians that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands of trucks and to the many thousands of out-of-state trucks and you get some inkling of New Jersey's missing

highway revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market truck operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway Picture

There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Mr. Stelljes said.

He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has removed many inequities from the older highway finance system adopted before trucking grew into a gigantic post-

war industry rolling up 142 billion ton-miles each year on the public roads, Mr. Stelljes stated.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

Frank Wheeler, program chairman of the Rotary, led a question-and-answer period after the speaker concluded. Discussion centered on Assembly Bill 13, passed in the special session of the legislature late this spring, as well as on the relief this proposal tax measure would give to property owners in this state.

EXHIBIT P-67B

[Handwritten notation:
*Butler Argus*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## BUTLER ROTARY CLUB HEARS HIGHWAY COST PROBLEMS DISCUSSED

### F. D. Stelljes, Auto Club Exec, Cites Damage by Trucks Asks Tax Revision

The immediate need for revising present highway user tax methods was stressed today (September 21) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., in a luncheon address before the Butler Rotary Club at the Northwood Inn.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Rotarians that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands of trucks and to the many thousands of out-of-state trucks and you get some inkling of New Jersey's missing

highway revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market truck operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway Picture

"There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Mr. Stelljes said.

He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road cost whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has removed many inequities from the older highway finance system adopted before trucking grew into a gigantic post-

war industry rolling up 142 billion ton-miles each year on the public roads, Mr. Stelljes stated.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

William C. Curnow, Jr., program chairman of the Exchange, led a question-and-answer period after the speaker concluded. Discussion centered on Assembly Bill 13, passed in the special session of the legislature late this spring, as well as on the relief this proposal tax measure would give to property owners in this state.

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EXHIBIT P-67C

[Handwritten notation:
*Lambertville Record*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## ROTARIANS REVIEW FINANCE PLAN FOR JERSEY HIGHWAYS

### F. Stelljes, Auto Club Official, Explains "Pay-As-You-Go" Tax on Highway Users

Advocating pay-as-you-use methods of highway taxation, Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., today (September 18) called for revision of New Jersey's highway tax structure to relieve property taxpayers and shift a fair share of road costs to those using them for commercial profit. Stelljes made the statement in an address before the Lambertville Rotary Club here at the Lambertville Home.

Stelljes advanced a theory of highway taxation currently in use in 17 states. He described it as a gross-ton-mile levy and claimed it is "the most equitable form of highway taxation."

"Today thousands of heavy out-of-state vehicles use our roads and pay little or nothing for use of the highways," Stelljes said. "Adoption of such a levy will place our highways on a sound financial basis."

Referring to the recently issued Fifth Annual Report of the State Tax Policy Commission, Stelljes said the Commission recommends adoption of a mileage tax on all motor carriers over 8,000 pounds. This tax, he said, would raise an estimated $9,000,000 additional highway revenue. "If this money was used on our roads," he said, "it would go a long way toward solving our present highway problems.

Since highway officials tell us our roads are breaking up faster than we can build them, I don't have to tell you how serious our highway problems are today," Stelljes said. "But the biggest single problem is: how and where are we going to find the needed millions of dollars to keep our roads in first-class condition? A ton-mile tax seems to be the answer."

Stelljes said that the Commission's report was precedent-breaking in that it proposed that out-of-state truckers are now getting "a free ride" on New Jersey's highways be required to contribute to the upkeep of roads used by those interstate carriers.

In a review of highway-user revenues for the past decade, Stelljes pointed out that in 1940 license fees, gas taxes and registration fees accounted for 87 per cent of all highway expenditures. Today, he added, only 55 per cent of the money spent for roads come from highway-user revenues. The other 45 per cent, Stelljes asserted, is raised by local administrators who take from property taxes.

Paul Mulloy, program chairman of the club, led a question-and-answer session following the address. The discussion included a review of the proposed ton-mile tax as well as interpretations by Stelljes of Assembly Bill 13, passed by the legislature earlier this year, which limits axle loads of trucks.

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EXHIBIT P-67D

[Handwritten notation:

*Summit Herald*
*Irvington Herald & Times*
*Millburn-Short Hills News*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## MILLBURN ROTARY CLUB HEARS FINANCE PLANS FOR JERSEY HIGHWAYS

### F. Stelljes, Auto Club Official, Explains "Pay As-You-Go" Tax on Highway Users

The immediate need for placing the financial burden of New Jersey highways on those that use and damage them the most was stressed today (Sept. 5) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, in an address at a luncheon meeting of the Millburn Rotary Club at The Chanticleer.

"Today thousands of heavy out-of-state trucks use our roads and pay little or nothing toward their support," Mr. Stelljes said, and explained that under present highway finance practices it is the private motorist, the light farm-to-market truck operators and property owners that foot the bill for highway construction and maintenance.

Today's confused highway financing hits the New Jersey farmer directly, according to Mr. Stelljes, who pointed out that while not long ago local farmers supplied the bulk of the farm produce for the state and neighboring metropolitan areas, in recent years long-haul trucks carrying produce grown in distant areas have captured many of the markets.

"And they have been able to do that only because a large portion of our tax dollar has been devoted to the building of fine highways that allow outsiders to compete unfairly with us," Mr. Stelljes said.

(MORE)

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more, according to the speaker, and revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

Summing up highway revenues of the last decade, Mr. Stelljes pointed out that 1940 license fees, gas taxes and registration accounted for 87 per cent of all highway expenditures. Today, he explained, only 55 per cent of money spent for roads come from highway revenues, the remainder coming from general taxes such as the property tax.

The recommendations of the Tax Policy Commission according to Mr. Stelljes, do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax and report that it has removed many inequities from the older highway finance system adopted before trucking grew to a gigantic industry rolling up 142 billion ton-miles each year on the public roads.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

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EXHIBIT P-67E

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Grange, New Jersey

## SUSSEX ROTARY CLUB HEARS NEW PLAN FOR FINANCING HIGHWAYS

### Fred Stelljes, Auto Club Exec., Explains "Pay-as-you-use" Levy on Road-users

SUSSEX—Advocating a pay-as-you-use form of highway taxation, Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., today (June 22) called for a revision of our highway tax structure to relieve general taxpayers and shift a fair share to those using the roads for commercial profit. Stelljes made the statement before the Rotary Club here at their weekly luncheon meeting at the Harrison House.

Stelljes advanced a theory of highway taxation currently being used in 17 states. He described it as a gross-ton-mile tax and "the most equitable form of highway taxation."

"If you don't use the highways, you don't pay; if you use the roads, you pay in direct proportion to your use of those roads," he said.

Referring to the recently issued Fifth Annual Report of the State Tax Policy Commission, Stelljes said the Commission recommends adoption of a mileage tax on all motor carriers over 8,000 pounds. This tax, he said, would raise an estimated $9,000,000 additional highway revenue. "If this money was used on our roads," he said, "it would go a long way toward solving our present highway problems.

"With our roads breaking up faster than we can build them and since we still owe more than $60,000,000 for our highways, I don't have to tell you how serious our

highway problems are today," Stelljes said. "But the biggest single problem is: how and where are we going to find the needed millions of dollars to keep our roads in first-class condition? The ton-mile tax seems to be the answer."

Stelljes, who is a retired Curtiss-Wright engineering executive, said that the Commission's report was precedent-breaking in that it proposed that out-of-state truckers getting "a free ride" on New Jersey's highways be required to contribute to the upkeep of roads used by those interstate carriers.

In a review of highway user revenues for the past decade, Stelljes pointed out that in 1940 license fees, gas taxes and registration fees accounted for 87 per cent of all highway expenditures. Today, he added, only 55 per cent of the money spent for roads come from highway-user revenues. The other 45 per cent, Stelljes asserted, is raised by local administrators who take from property taxes.

Referring to the recent Griffenhagen Report, a survey on highway problems in New York State, Stelljes said the report confirmed his contention "that New Jersey trucks pay comparatively little for their use of the state's highways." He pointed out that New Jersey receives less revenue from each big interstate truck than any other state in the nation.

"Yet, New Jersey has the heaviest truck traffic in the world," he said.

Dr. J. S. Haggerty, program chairman of the club, led a question-and-answer session following the address. The discussion included a review of the proposed mileage tax as well as interpretations by Stelljes of Assembly Bill 13, passed by the Legislature in May, which limits the axle loads of trucks.

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EXHIBIT P-67F

[Handwritten notation:
*Passaic Herald News*
*Verona-Cedar Grove Times*
*E. Orange Record*
*Montclair Times*
*Newark News*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## VERONA ROTARY CLUB HEARS FINANCE PLANS FOR JERSEY HIGHWAYS

### F. Stelljes, Auto Club Official, Explains "Pay-As-You-Go" Tax on Highway Users

The immediate need for placing the financial burden of New Jersey highways on those that use and damage them the most was stressed last night (August 31) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, in an address before a luncheon meeting here of the Rotary club at PAL's Cabin.

"Today thousands of heavy out-of-state trucks use our roads and pay little or nothing toward their support," Mr. Stelljes said, and explained that under present highway finance practices it is the private motorist, the light farm-to-market truck operators and property owners that foot the bill for highway construction and maintenance.

Today's confused highway financing hits the New Jersey farmer directly, according to Mr. Stelljes, who pointed out that while not long ago local farmers supplied the bulk of the farm produce for the state and neighboring metropolitan areas, in recent years long-haul trucks carrying produce grown in distant areas have captured many of the markets.

"And they have been able to do that only because a large portion of our tax dollar has been devoted to the building of fine highways that allow outsiders to compete un-

fairly with us," Mr. Stelljes said.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more, according to the speaker, and revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

Summing up highway revenues of the last decade, Mr. Stelljes pointed out that 1940 license fees, gas taxes and registration accounted for 87 per cent of all highway expenditures. Today, he explained, only 55 per cent of money spent for roads come from highway revenues, the remainder coming from general taxes such as the property tax.

The recommendations of the Tax Policy Commission, according to Mr. Stelljes, do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax and report that it has removed many inequities from the older highway finance system adopted before trucking grew to a gigantic industry rolling up 142 billion ton-miles each year on the public roads.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

—0—

EXHIBIT P-67G

[Handwritten notation:
*Morristown Daily Record*
*Parsippany Citizen*
*Denville Herald*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## ROTARY CLUB HEARS ROAD COSTS BURDEN PROPERTY TAXPAYER

### F. Stelljes, Auto Club Official, Explains "Pay-As-You-Go" Tax on Highway Users

BOONTON—The unfairness of present highway taxes in New Jersey and the resulting hardship on private motorists and property owners was pointed out today (August 29) by Fred D. Stelljes, vice-president of New Jersey Automobile Owners, in a luncheon talk before the Rotary Club here in the Knoll Golf Club.

"Passenger car owners pay too much and big trucks pay too little," Mr. Stelljes declared, saying that if a ton-mile unit is used to measure highway use, passenger car owners each pay about $6.29 more than their share of highway costs—an overpayment of $7,070,000 last year.

On the same ton-mile basis big trucks underpay their share of highway costs by as much as $451.29 a year, according to Mr. Stelljes. "Apply that sum to even a portion of the state's thousands of big trucks and you get some inkling of the size of New Jersey's missing highway revenues," he said. "If big trucks, especially from out-of-state, paid their fair share, there would be few highway problems," he pointed out.

There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Stelljes said, and

explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A major step in solving the New Jersey highway problem, Mr. Stelljes believes, would be a concentrated public effort to back the State Tax Policy Commission's recommendation that a mileage tax be adopted on all motor carriers of 8,000 pounds or more. The revenue from such a tax has been estimated at $9,000,000, half of which could go to relieve local taxes or to reduce license fees.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges. "Now," he concluded, "we must take steps to place the costs of our highways on a fair basis by levying taxes according to highway use." John Howell, program chairman of the Rotary, led a question-and-answer period after the speaker concluded. Discussion centered on Assembly Bill 13, passed in the special session of the legislature late this spring, as well as on the relief this proposal tax measure would give to property owners in this state.

—0—

EXHIBIT P-67H

[Handwritten notation:
*Whitehouse Station Review*
~~*Flemington Democrat*~~
*High Bridge Gazette*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## CLINTON ROTARY HEARS HIGHWAY FINANCE PLAN DISCUSSED AT MEETING

### F. D. Stelljes, Auto Club Exec, Cites Damage by Trucks, Asks Tax Revision

The immediate need for revising present highway user tax methods was stressed today (September 15) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., in a luncheon meeting before the Clinton Rotary Club at the Clinton Inn.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Rotarians that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands of trucks and to the many thousands of out-of-state

trucks and you get some inkling of New Jersey's missing highway revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway Picture

There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Mr. Stelljes said.

He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has

removed many inequities from the older highway finance system adopted before trucking grew into a gigantic post-war industry rolling up 142 billion ton-miles each year on the public roads, Mr. Stelljes stated.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

At the conclusion of Mr. Stelljes' address, a question-and-answer period developed. Much of the discussion centered on Assembly Bill 13, limiting axle loads of trucks, which was passed in the legislature late this spring. The speaker also spoke informally about current drives against overloading being waged in other states.

EXHIBIT P-671

[Handwritten notation:
*Phillipsburger*
*Easton Express*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## EXCHANGE CLUBS HEARS HIGHWAY TAXES BURDEN N.J. PROPERTY OWNERS

### F. D. Stelljes, Auto Club Exec, Cities Damage by Trucks Cost to Taxpayer

The immediate need for revising present highway user tax methods was stressed tonight (September 21) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., at an address before the Phillipsburg Exchange Club at the Elks Club.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Exchange Club members that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands of trucks and to the many thousands of out-of-state trucks and you get some inkling of New Jersey's missing

highway revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market truck operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway Picture

There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Mr. Stelljes said.

He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has removed many inequities from the older highway finance system adopted before trucking grew into a gigantic post-

war industry folling up 142 billion ton-miles each year on the public roads, Mr. Stelljes stated.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

William C. Curnow, Jr., program chairman of the Exchange, led a question-and-answer period after the speaker concluded. Discussion centered on Assembly Bill 13, passed in the special session of the legislature late this spring, as well as on the relief this proposal tax measure would give to property owners in this state.

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EXHIBIT P-67J

[Handwritten notation:
*Red Bank Register*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## LIONS CLUB HEARS FINANCE PLAN FOR JERSEY HIGHWAYS

### F. Stelljes, Auto Club Official, Explains "Pay-As-you-Go" Tax on Highway Users

Advocating pay-as-you-methods of highway taxation, Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., today (Sept. 5) called for revision of New Jersey's highway tax structure to relieve property taxpayers and shift a fair share of road costs to those using them for commercial profit. Stelljes made the statement at a dinner before the Middletown Lions Club here at Louis' Bar and Grill.

Stelljes advanced a theory of highway taxation currently in use in 17 states. He described it as a gross-ton-mile levy and claimed it is "the most equitable form of highway taxation."

"Today thousands of heavy out-of-state vehicles use our roads and pay little or nothing for use of the highways," Stelljes said. "Adoption of such a levy will place our highways on a sound financial basis."

Referring to the recently issued Fifth Annual Report of the State Tax Policy Commission, Stelljes said the Commission recommends adoption of a mileage tax on all motor carriers over 8,000 pounds. This tax, he said, would rais an estimated $9,000,000 additional highway revenue. "If this money was used on our roads," he said, "it would go a long way toward solving our present highway problems.

Since highway officials tell us our roads are breaking up faster than we can build them, I don't have to tell you how serious our highway problems are today," Stelljes said. "But the biggest single problem is: how and where are we going to find the needed millions of dollars to keep our roads in first-class condition? A ton-mile tax seems to be the answer."

Stelljes said that the Commission's report was precedent-breaking in that it proposed that out-of-state truckers are now getting "a free ride" on New Jersey's highways be required to contribute to the upkeep of roads used by those interstate carriers.

In a review of highway-user revenues for the past decade, Stelljes pointed out that in 1940 license fees, gas taxes and registration fees accounted for 87 per cent of all highway expenditures. Today, he added, only 55 per cent of the money spent for roads come from highway-user revenues. The other 45 per cent, Stelljes asserted, is raised by local administrators who take from property taxes.

David Houser, program chairman of the club, led a question-and-answer session following the address. The discussion included a review of the proposed ton-mile tax as well as interpretations by Stelljes of Assembly Bill 13, passed by the legislature earlier this year, which limits axle loads of trucks.

—0—

EXHIBIT P-67K

[Handwritten notation:
*Newark News*
*Summit Herald*]

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## OPTIMISTS HEAR N.J. ROAD COST PROBLEMS AIRED

### F. D. Stelljes, Auto Club Exec, Cites Damage by Trucks, Asks Tax Revision

The immediate need for revising present highway user tax methods was stressed tonight (September 19) by Fred D. Stelljes, vice president of the New Jersey Automobile Owners, Inc., in an address before the Optimists Club at the Suburban Hotel.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Optimists that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands of trucks and to the many thousands of out-of-state trucks and you get some inkling of New Jersey's missing highway

revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market truck operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway Picture

There is no true relationship in the present highway tax structure between the amount of taxes paid and the amount of benefit obtained from highway use, Mr. Stelljes said.

He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at $9 million—a sum that would go a long way toward solving the present highway finance problem.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has removed many inequities from the older highway finance system adopted before trucking grew into a gigantic post-

war industry rolling up 142 billion ton-miles each year on the public roads, Mr. Stelljes stated.

"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

—0—

EXHIBIT P-67L

FROM: Robert A. Fox
New Jersey Automobile Owners, Inc.
155 Evergreen Place
East Orange, New Jersey
ORange 2-0416

## POMONA GRANGE HEARS ROAD FINANCING PLAN TO AID N.J. FARMERS

### F. D. Stelljes, Auto Club Exec, Says Farmers Overpay on Truck Registrations

The immediate need for revising present highway user tax methods was stressed Saturday night (September 9) by Fred D. Stelljes, vice-president of the New Jersey Automobile Owners, Inc., in an address before the Pomona Grange, Central District #9, in the Myersville Grange Hall.

He said the financial burden on property owners today has resulted in an unfair hardship and proposed that the trucking industry assume a larger share of road costs.

In what he termed the "unfairness of current New Jersey highway taxes," Mr. Stelljes told assembled Grangers that passenger car owners pay too much and big trucks too little. He said:

"Using the accepted unit of measure of highway use, the ton-mile, we discover that we passenger car owners pay about $6.29 more than our fair share of highway costs."

"That over payment totals more than $7,000,000 a year."

He stated that big trucks underpay their proper share of road costs by as much as $451.29 a year.

"Apply that sum to even a portion of the state's thousands

of trucks and to the many thousands of out-of-state trucks and you get some inkling of New Jersey's missing highway revenue. If big out-of-state trucks, which now pay nothing for the use of our roads, paid their fair share there would be few highway problems."

He explained that under today's highway finance practices the private motorist, the light farm-to-market truck operators, light panel truck owners and property owners foot the bill for highway construction and maintenance.

## Confused Highway picture

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He explained that in 1940 highway user taxes—gas taxes, registration and license fees—accounted for 87 per cent of all highway expenditures while today they provide only 55 per cent of the total.

This means that local property taxes are being diverted to make up the 45 per cent difference, the speaker said, stressing that property owners are now paying almost half of all street and road costs whether or not they own an automobile.

A solution to the problem is outlined in the recent issue of the State Tax Policy Commission's fifth report, Mr. Stelljes said. The Commission recommends that a mileage tax be adopted on all motor carriers of 8,000 pounds or more.

He said that revenue from such a tax has been estimated at 9 million—a sum that would go a long way toward solving the present highway finance problems.

## Quotes Tax Commission

The recommendations of the Tax Policy Commission, according to Mr. Stelljes do not set a precedent. Fourteen states already have in operation modifications of the Commission's ton-mile tax, he said. They report that it has

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"New Jersey, the most truck-traveled state in the nation, has the most to gain from the ton-mile tax and the most to lose if our highway finances remain in their present jumbled condition," Mr. Stelljes said.

Stelljes said that the people scored a victory in the recent legislation to limit truck axle loads and to protect New Jersey highways and bridges.

"Now," he concluded, "we must take steps to place the cost of our highways on a fair basis by levying taxes according to highway use."

Mrs. Virginia Walker, Lecturer of Troy Hills, introduced the speaker. She asked for questions from the floor when Mr. Stelljes had concluded. Many inquiries concerned Assembly Bill 13, limiting truck axle loads, which was passed in the legislature late last spring.

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EXHIBIT P-71

NEW JERSEY AUTOMOBILE OWNERS, INC.
Incorporated 1938
155 EVERGREEN PLACE [Emblem] EAST ORANGE, N. J.
ORange 2-0416

OFFICERS
James L. Macwithey
President
Frederick D. Stelljes
Executive Vice-President
Sigfrid Lonegren
Vice-President
William C. Moore
Vice-President
Frank W. Maxwell
Vice-President
DIRECTORS
Catesby L. Jones
Victor Mosley
John A. Ward
Jules Tepper
Counsel

October 10th, 1952

Dear Editor:

We are enclosing a reprint of a very informative article from Harper's Magazine: "Who Should Pay for Our Roads?" While the author is an Oregon legislator, he points up a problem that faces all states—how to finance the highways which are so necessary in these days of automotive transportation.

Many of the points Mr. Neuberger makes pertain to New Jersey—notably the fact that a 60,000-pound truck in New Jersey pays a tax of $810 while the same vehicle in Oregon pays $2,445 a year. How to obtain additional funds for our roads, streets and highways is certain to be an important issue in the next legislature. You may find this article helpful background information in discussing this highway problem in your community.

Sincerely,

/s/ FRED D. STELLJES
Fred D. Stelljes

EXHIBIT P-73

# EMPIRE STATE TRANSPORT LEAGUE

ELEVEN NORTH PEARL STREET
ALBANY, N. Y.

ROMWELL WOODWARD, Chairman
Utica, N. Y.

L. Torbert
Syracuse, N. Y.

rman J. Gould
Seneca Falls, N. Y.

rl J. Colwell
Hudson, N. Y.

A. Cooley
Buffalo, N. Y.

R. Wycoff, Jr.
Buffalo, N. Y.

P. Crone
Buffalo, N. Y.

hn Tritten
Utica, N. Y.

harles J. Peters
Utica, N. Y.

al O. Sheldon
Schenectady, N. Y.

C. Richter
Schenectady, N. Y.

lle Ten Eyck
Schenectady, N. Y.

harles W. Coneway
Schenectady, N. Y.

W. Biggs
Rochester, N. Y.

r. Adrian Buyse
Rochester, N. Y.

October 8th, 1952

Dear Sir:

The problem of highway finance is one that not only affects the majority of our citizens but confronts virtually every state legislature.

We feel so strongly on this subject that we are sending you an advance reprint from the October issue of Harper's Magazine which spotlights the unfairness of highway-user taxes as they affect the average motorist.

Sincerely yours,

/s/ CROMWELL WOODWARD
Cromwell Woodward

EXHIBIT P-79

FROM: Fred W. Goodwin, Director
N. J. Citizens Tax Study
Foundation
786 Broad Street,
Newark 2, NJ
MArket 3-1118

FOR RELEASE after 12 noon
Wednesday October 17, 1951

"What New Jersey needs is not more taxes, but more taxpayers," the Camden Lions Club was told today (Wednesday, October 17) at the regular luncheon meeting at the Walt Whitman Hotel. The speaker, C. Colburn Hardy, secretary of the N.J. Citizens Tax Study Foundation, told club members that "the present New Jersey tax system was a mass of inequities, exemptions, and archaic administration, utterly unfitted for the basic needs of state and local governments."

Hardy said that the Foundation was attempting to arouse citizens to the importance of immediate constructive action on a two-front attack. "At a local level," he said, "there must be intelligent administration of the property tax which accounts for 92 per cent of tax revenues. He urged two steps:

(1) uniform assessment policies so that similar properties carry similar valuations no matter where they may be located.

(2) immediate review of all tax exempt property to be certain that the present tax exemptions are fully justified.

Equally important, the former Essex County assemblyman stressed was a review of the state tax system, especially the program of State Aid. Pointing out that New Jersey was traditionally a "home rule" state, believing that money spent locally should be raised locally, he said that the first broad program of State Aid to local government had started in 1947. Since then, he stressed, costs of local government have risen over $30,000,000, but direct State Aid has remained unchanged, throwing an increasingly greater burden on local property owners. He said that educational costs in Camden County had increased over $1,000,000 between 1948 and 1951, but State Aid to Education had dropped nearly $100,000 during the same period. Hardy explained that the extra State revenues had been needed to meet

rising costs of State administration, so that the Governor and the Legislature had held State Aid to Education at $25,000,000 a year.

"In much the same way," the Foundation trustee said, "the local property owner is being forced to pay a greater share of highway costs. In Camden, expenditures for streets and roads were $309,000 greater in 1950 than in 1947; despite $73,885 in State Aid.

"It is obvious," he added, "that the entire program of State Aid should be reviewed in light of these changing economic and fiscal conditions. The tremendous influx of younger children, the thousands of new suburban homes, the vast traffic, and the drain of the resources of older cities, he said, have created new and unexpected problems.

"The crux of the problem," Hardy said, "is that real property—land, buildings, machinery, etc., with an assessed value of $6 billions account for 85 per cent of all State and local taxes, while other types of wealth—stocks, bonds, cash, automobiles, trucks, etc.—with an estimated valuation of $20 billions are largely escaping taxation because of full or partial tax exemption."

Hardy stressed that the Foundation would not sponsor or endorse any specific proposals but would continue to stress the need for intelligent tax revision such as proposed by the Commission on State Tax Policy. He concluded by outlining the six suggestions made by the Commission in its recent report to the Governor and Legislature:

(1) better administration of the property tax.
(2) revised business taxes, notably a corporate income tax.
(3) a gross-ton-mile tax on heavy trucks.
(4) a personal income tax
(5) a general sales tax and
(6) broader taxing powers for local governments.

—0—

EXHIBIT P-80

From: Robert A. Fox
New Jersey Automobile
Owners, Inc.
155 Evergreen Place
East Orange, N. J.

For release Thursday, March 9, 1950

# HIGHWAY STUDY SHOWS TRUCKS PAY TOO LITTLE

## New York Survey Shows Parallel With Jersey Tax Problem Auto Official Says

A six-month study of highway taxation and finance in New York state, just completed by nationally famous research consultants, reveals a close parallel between that state's and New Jersey's out-of-date and unrealistic highway financing problems, according to Fred Stelljes, vice president of the New Jersey Automobile Owners, Inc.

The report, compiled by Griffenhagen and Associates for a taxpayers' group at Albany, recommended a sharp increase in heavy truck taxes and a decrease in the license fees of passenger cars. The recommendation was keyed to the fact that trucks roll up more ton-miles in the state than do New York's 3,000,000 passenger cars. On a ton-mile basis, however, the passenger car pays four times as much as the heavy truck, the survey showed.

New York's collections from gas taxes and license fees paid by the owner of a truck of the heaviest type were shown to be $940, compared to a national average of $1,687. The Empire state was listed as the third most lenient in the nation.

In the same table, New Jersey was shown as collecting $785 from the same size truck, making it the most lenient of all states. Topping the nation in tax receipts from the heavy commercial haulers was Michigan, where the heaviest truck's annual gas taxes and license fees averaged $3,178.

The survey recommended lowering license fees for a 3100-pound passenger car in New York from $15.50 to $6.41, and for light pick-up trucks from $24 to $14.70, without changing the state's four-cent gas tax. In heavier commercial brackets, however, it advocated an $8 increase in taxes for the heaviest type truck. This recommendation

ompares with a $46 heavy truck license increase proposed in a new



icensing bill now before the New Jersey legislature.

The financial operations of all 1620 political units in New York dministering highways, roads and streets are grouped together for he first time in the Griffenhagen study. Most studies confine themelves to a state highway system alone, but by examining the state, ity, county and town systems as an entity, the report was able to easure what the thoroughfares cost all taxpayers living within a state. It showed that the heaviest cost, 51 per cent, was borne by cities, ith the state government paying 23 per cent, towns and counties 13 r cent each of all costs of the highway plant for the 22-year period nding 1947—the last year for which figures were available.

The New York study shows that trucks roll up 53 billion ton-miles f travel in that state, against 45 billion passenger-car ton-miles. New ersey registration figures show that this state has a higher ratio of ucks to passenger cars than New York. In New Jersey the one out f five vehicles registered is a truck, while New York's ratio is one six. In the heavy-truck bracket, New York ranks third in the nation supporting heavy truck loads, but New Jersey leads the nation. In ct, its highways carry almost twice as many trucks of ten tons or ore than New York, according to the U. S. Bureau of Public Roads.

A comparison of the 400-page Griffenhagen report with New Jersey gistration figures shows, Mr. Stelljes said, that the Garden state is ven more unfair than New York in its present taxing methods of rdening the passenger-car owner with highway costs."

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EXHIBIT P-81

From: New Jersey Automobile Owners, Inc.
1060 Broad Street
Newark, New Jersey

For Release 12 Noon
Wednesday, Dec. 14

# TAX COMMISSION HEARS PLEA FOR NEW TRUCK LEVY

## Auto Owners Call For Increase In Highway-User Fees Based On 'Ton-Miles' Traveled

TRENTON, Dec. 14—New Jersey taxpayers would be relieved of the burden of a general tax increase under a $20,000,000 tax program proposed today to the State Tax Policy Commission by Jules Tepper, counsel of the New Jersey Automobile Owners, Inc. He told the commission, which is seeking new sources of state revenue, that a gross ton-mile tax levied against heavy commercial trucks would yield at least $20,000,000 annually.

Declaring that "the passenger-car owner is paying too much and the big truck operator too little," Tepper pointed out that the ton-mile is now used as the basis for taxation in 14 states. He said the tax he proposed should be applied only to heavy trucks—those weighing over 7½ tons when loaded. He cited studies to show that in 194[illegible] every passenger-car owner paid "$8.13 more than his fair share" of highway costs, while big interstate trucks weighing 12 tons and more paid as much as $597.42 less than their ton-mile share annually.

"If plans now in force in other states were applied to the huge highway boxcars crossing New Jersey," Tepper said, "the total possible net revenue could be, at a conservative estimate, $20,000,000. The exact figure would, of course, depend on the tax and basis of assessment. The additional revenue would relieve the tax-burdened property owner and make it possible to use more local taxes for education, recreation

rotection, and services—the purposes for which they were originally tended."

Pointing out that property owners are now paying 42 per cent of all ghway costs compared to 13 per cent in 1939, Tepper said, the ton-ile tax can do much to ease the local and street and highway tax rden by shifting this load to its proper base, the commercial users ho use our highways for profit. "These are the same vehicles," he lded, "which . . . so largely responsible for intolerable conditions of ngestion, delay and highway damage."

Tepper, former president of the Essex County Tax Board, stressed . fact that the growth of these heavy trucks is largely a postwar henomenon. Between 1940 and 1948, he said, there was an increase f only 17 per cent in automobile registration, but heavy trucks reg-tered in New Jersey jumped 34 per cent. "Besides, there are hun-eds of thousands of highway behemoths from out of state roaring er our highways practically free of charge. Highway engineers ross the country "are virtually unanimous in finding that the in-ease in trucking is raising havoc with roads."

"New Jersey obtains less revenue from a heavy truck than any other ate except Massachusetts," Tepper continued. "A 10-ton trailer truck, aveling 45,000 miles a year, pays registration and gas taxes of 1.50. Forty-six other states have higher highway user fees. In egon, under a ton-mile tax, the same operator would pay $1,467; West Virginia, $1,913.16." In concluding, Tepper urged the com-ssion to study the ton-mile tax as a "fair levy that seeks only to ocate the costs of our streets and highways against the users. It is gical solution to a vexing revenue problem, a solution that has been nd successful in 14 other states."

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EXHIBIT P-83

FROM: Robert A. Fox, Secretary
New Jersey Automobile
Owners, Inc.
155 Evergreen Place,
ORange 2-0416
East Orange, New Jersey

For release in papers of
January 3, 1951

Governor Driscoll and the Legislature were given notice today that New Jersey motorists would vigorously oppose any increase in gasoline taxes until the present subsidy to long-haul truckers is eliminated by the enactment of a gross-ton-mile tax. This warning was made by James L. Macwithey, president of the New Jersey Automobile Owners Inc.

Macwithey, who is chairman of the Roads Committee of the East Orange City Council, said his organization was alarmed at report that the State officials are considering an increase in the motor fuel tax.

"As representatives of the motoring public," Macwithey wrote the Governor, "we are opposed to a straight increase in gasoline taxes. The private motorist now pays more than his fair share of road costs while heavy trucks are too lightly taxed. An increase in gasoline taxes would compound a long-standing felony perpetrated on the private car and light truck owners."

Macwithey urged the Governor "to sponsor the proposal of the Commission on State Tax Policy to levy a gross-ton-mile tax on big over-the-road trucks, including out-of-state vehicles which pound our highways day and night."

Macwithey cited the Tax Policy Report to show that "private motorists and owners of small trucks now subsidize the long-haul truckers by as much as $7,841,000 annually."

"Before consideration is given to raising the gas tax," he wrote, "the State should eliminate this subsidy and create a highway-user tax program which will benefit the millions of New Jersey motorists rather than satisfy the pressure of the truck lobby."

Macwithey estimated the revenue from the ton-mile tax at from $9 to $20 million, depending on the rate established which will fall

entirely on commercial carriers "who use our streets and roads for profit at the expense of other highway users as well as the general taxpayer." "On the other hand," he said, "a one-cent increase in the motor fuel tax will yield some $12,000,000, increasing the average motorist's taxes."

Macwithey said that "more money must be spent on our highways to relieve the present congestion" and "the first step must be a revision of highway user fees so that payments can be based on use and cost rather than on antiquated financial practices dating back to the years before over-the-road use of highways became a major national problem."

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EXHIBIT P-84

From: New Jersey Automobile Owners, Inc. For Immediate Release
1060 Broad Street
Newark, New Jersey

## ASK TAXES ON BIG TRUCKS AS AID TO JERSEY EDUCATION

Proposals for new taxes to meet increased costs of government and provide larger State aid to education were urged at a hearing in Trenton before the Commission on State Tax Policy. The proposals included suggestions for a general sales tax, personal income levy, larger corporate taxes, and a proposal to initiate a "ton-mile" tax on commercial highway users.

Jules Tepper, general counsel for the New Jersey Automobile Owners, Inc., called for a gross-ton-mile tax against heavy trucks operating on intrastate and interstate runs. A conservative estimate of the revenue that would accrue to the state from such a levy, Tepper said, would be $20,000,000. This money, he said, could be used to enlarge the present school system in New Jersey which needs about $40,000,000 in the next few years to meet rising costs and enrollments.

In a statement delivered before the full Commission gathered in the State House, Tepper said passenger-car owners, whose interest he represented, paid "$8.13 more than their fair share" of highway costs while big interstate highway box car trucks weighing more than 12 tons paid as much as $597.42 less than their ton-mile share annually.

Tepper's suggestion came as a surprise to many members of the Commission, but they indicated interest in the possibility of tapping a virtually untouched source of state revenue to help solve a growing school-costs problem.

The hearing, headed by Dr. John F. Sly of Princeton, heard a wide range of opinions as to methods that should be employed to broaden the present tax base and establish "a more equitable distribution of tax

responsibility and payment." Governor Driscoll has been asked by department heads and various state spending agencies for $230,000,000 for the year beginning July 1, 1950. That is $70,000,000 more than was appropriated for the present fiscal year.

William S. Weeks, president of the New Jersey Taxpayers Association, opposed any form of tax increase "until positive steps have been taken to achieve every possible economy." On the other hand Harry Kranz, legislative director of the state CIO, recommended a levy on corporation net profits in excess of $10,000. Kranz said that this type of tax program should be geared to produce up to $70,000,000 annually.

A plea for "a more equitable approach" to the problem of railroad taxes was made by David Mackie, representing the Associated Railroad of New Jersey. Mackie said the 1948 revision of railroad taxes "has been working a hardship on the railroads" and cited as the most outstanding inequity the provision for taxing rail companies' rolling stock while allowing competitive heavy trucks to remain free of this tax burden.

The Chamber of Commerce representatives were virtually unanimous in calling for a complete review of the tax structure with an aim to clarifying the tax picture, and in wanting to have progressive studies made before any new taxes are imposed. Kenneth Parry, of New Brunswick, speaking for the New Jersey Chamber of Commerce, said business is willing to carry its full share of the taxes necessary to provide an efficient and adequate state government, but cautioned against "piling new taxes on unsound, old ones, which compounds hardships and works capricious treatment of taxpayers."

Mrs. Charles Keller, of the League of Women Voters, also called for a more equitable distribution of the tax burden. She requested that the Commission recommend ways to provide funds for more state aid to education, increased and better care and treatment of the mentally ill and equalization of assessments.

Among those represented at the hearing were the Chambers of Commerce of New Jersey, Newark and Jersey City, educational groups such as State Federation of District Boards of Education, New Jersey PTA Congress, Educational Planning Commission, the state CIO Council, League of Women Voters and the N.J. American Veterans Committee.

EXHIBIT P-85

## STATEMENT BEFORE THE COMMISSION ON STATE TAX POLICY AT PUBLIC HEARING AT TRENTON, ON WEDNESDAY, DECEMBER 14, 1949, BY JULES TEPPER, COUNSEL FOR THE NEW JERSEY AUTOMOBILE OWNERS, INC.

GENTLEMEN—My name is Jules Tepper. I appear here today as counsel for the New Jersey Automobile Owners, Inc., a New Jersey corporation organized in 1938 to protect the automobile owner from the increasing perils of trucks, traffic and taxation.

Today I should like to present for your consideration a tax program that can yield up to $20,000,000 additional revenue. The New Jersey Automobile Owners, Inc., proposes a gross ton-mile tax to be levied against the heavy commercial trucks.

This is a fair tax, for it is based on actual use. This is a logical tax, for it places the burden where it rightfully belongs. This is an equitable tax, for it corrects inequities which have been growing more serious. This is a justified tax for it is a payment for services rendered by the government of our state.

As I will explain later, it is important to remember that New Jersey obtains less revenue from each heavy truck than any other state except Massachusetts. In annual revenue from each truck which uses our highways, the State of New Jersey ranks next to the bottom: 47th out of the 48 states.

The tax problems which face our state are well known. I should like to emphasize the highway problems we face. According to State Highway Department officials, New Jersey has a backlog of $800,000,000 worth of road work which must be done to bring road repairs up to date. This does not include future work needed to meet the demands of increasing traffic and congestion. And this is only part of the story, for our cities and towns are faced with intolerable conditions of con-

gestion, delay and streets broken to bits by the heavy trucks, many of them from other states. These municipalities seek, and we believe deserve, additional state aid for their streets and roads. Finally, we have the county roads, a once adequate and well-kept system built to help our farmers bring their produce to market. These are light-traffic roads, designed for the small farm trucks. Yet they, too, are being battered and gouged by the huge, overloaded, freight tractor-trailers. As motorists who pay the great majority of highway-user taxes, we are alarmed—yes, even frightened—at what lies ahead on our New Jersey highways.

This situation is not confined to New Jersey. Other states, faced with the same destruction, have attempted to revise their tax structure so that every motor vehicle pays its fair share of highway costs.

Some years ago, when I was president of the Essex County Tax Board, I pointed out that the property owner was taxed unfairly for streets and roads. The condition still exists. In fact, it is growing worse very rapidly. Ten years ago, highway-user revenues took care of 87 per cent of total highway costs. This year—1949—highway-user revenues account for only 58 per cent of total highway expenditures. In other words, Mr. Property Owner, already the largest taxpayer in the state, is now paying 42 per cent of highway costs compared to 13 per cent ten years ago. That's more than three times as large a percentage—and the actual dollar costs are, of course, much higher.

The New Jersey Automobile Owners believe that gross ton-mile tax can do much to save our communities and ease the local and state tax problem. By shifting a proper share of the tax burden to those who use the highways commercially, our governments can have sufficient funds for the essential needs of our schools and municipalities.

As I have said hundreds of times before, it is time we got down to fundamentals on our tax policy and recognized that the commercial

vehicles use our highways and roadways for profit. These huge vehicles are like a circus. They roll through our towns, using our facilities, clogging our streets, paying almost nothing for the privilege and leaving behind them rubble and odors.

Now I want it clearly understood that the New Jersey Automobile Owners are concerned only with the heavy trucks. We know from personal experience that the small intra-city trucks, the delivery trucks, and the farmers' vehicles are just as concerned about these highway monsters as are we. When we use the term, "heavy trucks," we refer to the larger vehicles which weigh 7½ tons or over when loaded.

I wonder if you realize that the growth of these heavy trucks is largely a postwar phenomenon. Between 1940 and 1948, there was an increase of only 17 per cent in automobile registration in New Jersey, but registration of heavy trucks jumped 34 per cent. This, of course, does not include the thousands of huge highway boxcars that come from out-of-state—the number of these undoubtedly has increased even more, proportionately, since the big-truck population has grown in all states, and these trucks do more long, interstate hauling.

These are the trucks which break up our highways, and cause excessive maintenance expense. As the Newark News said in an excellent series of articles: "Highway engineers across the country are virtually unanimous in finding that the increase in trucking is raising havoc with roads." I want to stress these damage and cost factors, because they are creating future tax problems for our state.

We believe that the historic state policy of highway-user taxes should be continued. But we believe that these taxes should be based on highway use. We believe that the gross ton-mile tax is the most equitable method of assessing highway expenses.

A ton-mile tax is based on the fact that highway wear is related to weight and usage. It represents the yardstick of moving one ton one

mile. Thus the operator, be the vehicle a pleasure car of a trailer-truck, pays in direct proportion to the number of ton-miles driven. That is, an ordinary passenger car weighing 1½ tons and making a 100-mile trip, uses the highways to the extent of 150 gross ton-miles; a 10-ton tractor-trailer with 20-ton pay load would have a gross ton-miles index of 3,000 in making a trip of the same length.

On this basis of determining the relative amount of transportation service rendered by the roads to user groups and the sharing of costs, the Jersey passenger car owner is paying too much and the big truck operator too little.

For example, the 1947 state highway expenditures were approximately $56,000,000. This includes state aid to counties and municipalities. In that year there were 1,108,522 passenger cars.

The Newark Evening News pointed this out very clearly as follows: "Applying the ton-mile yardstick to the 1947 state highway expenditures of $56,000,000, which includes aid to counties and municipalities, passenger car owners each paid $8.13 more than their share of highway costs. This 'overpayment' totaled $7,077,000." (End of quotation). And remember, gentlemen, that this overpayment was by you and me and the million other motorists who try to use the highways for pleasure and not commercial gain. In 1947 we paid over $7,000,000 for the benefit of commercial operators—the same people, in large measure, whose huge highway boxcars slow our traveling, scare our families and cause thousands of hours of frustration, millions of headaches and billions of bad tempers every year. Nor can we forget the 15,746 accidents in New Jersey involving trucks—accidents that killed 545 people last year.

Another class which is discriminated against is the small trucker—fellows with vehicles weighing under four tons. They overpay anywhere from $5.26 to $16.96 each when highway use is figured on a ton-mile basis.

Let's see what the News has to say about the other end of the scale:—

the big interstate trucks weighing 12 tons and more. It says they underpay as much as $597.42 each . . . every year.

There is ample proof that a ton-mile tax is backed by the weight of authority and experience. Fourteen states now use a ton-mile as the basis for taxation. In its report to the Congress of the United States, the Board of Investigation and Research on Public Aids to Domestic Transportation said: "gross ton-mileage appears to be the best common measure of the relative amount of transportation service rendered by roads."

In Illinois, Griffenhagen & Associates, an engineering firm which studied Illinois highways concluded: "Ton-miles is the fairest measure of relative use." In Maryland, the State Roads Commission recommended to the Governor that "The ton-mile basis . . . contains most of the important factors necessary in the development of equitable truck fees." And right here in New Jersey, in their study "Financing New Jersey Highways," Theodore N. Benson and Robert H. McClain, Jr., used the gross ton-mile method to allocate cost allocations. They concluded that "It seems logical and fair to devise some type of tax which will make these out-of-state users pay some of the highway costs, especially these larger trucks and trailers which cause the majority of the damage to the roads and for which the improvements are paid."

How much additional revenue could New Jersey derive from a gross ton-mile tax? It is difficult to estimate exactly. There are no accurate figures on the number and size of out-of-state trucks which rumble over our highways. Highway Commissioner Miller has estimated that 30 per cent to 35 per cent of New Jersey's traffic on some highways is made up of trucks. According to highway studies, 26.3 per cent of all trucks bear out-of-state licenses. And I think you will agree with me that the vast majority of these out-of-state trucks are the big highway box-

cars, tractor-trailer vehicles weighing up to 30 tons legally and many



tons more illegally.

In estimating how much revenue could be derived if these heavy trucks paid their fair share of highway costs, we have been ultra conservative. We have not included any out-of-state trucks in our calculations. Thus it is highly probable that revenues under a gross ton-mile tax in New Jersey would be greater—20 to 25 per cent greater.

We are also conservative on the estimated annual mileage traveled by commercial trucks. While the American Trucking Association reports that a 20-ton truck travels 49,000 miles a year, we have set the figure at 39,000 miles. This same underestimate continues throughout our report. We have attempted to approach this problem realistically, so that no false hopes or unfair criticism may be aroused.

In New Jersey there are registered 15,000 trucks rated at five to ten tons. These have a chassis weight of six tons and a maximum gross weight of 13½ tons. According to the State Highway Department, there are 21,000 trucks and tractor-trailer combinations rated at 19 tons. These 10-ton-rated trucks weigh nine tons, have a gross weight of 20 tons. Using fiures substantially below the findings of the American Trucking Association, we have assumed that the five-ton-rated truck travels 34,000 miles a year and the 10-ton-rated truck 39,000 miles annually.

We have carried our conservative estimates one step further by setting 20 tons as the maximum gross weight, even though the state law permits gross weights of 30 tons. I believe you will agree that a majority of interstate trucks are big haulers, weighing close to—if not above—the legal limit.

In levying the gross ton-mile tax, the 12 states use various bases, which are explained in detail in the accompanying addenda. The rates vary from ⅛ mill per gross ton mile in West Virginia to 29 mills per

mile in Oregon. The taxing base is usually based on a combination of the weight and rated capacity. Some states limit the tax to common carriers, others include all commercial vehicles. These states have recognized also that the tax should fall on the larger commercial vehicles and should not be levied against the farm vehicles and intra-city delivery trucks. We agree with that approach to the problem. As automobile owners seeking a plan that will have each motor vehicle pay a fair share of its cost of our highways, we believe that each large truck should pay on the basis of its weight and mileage, regardless of the type of haulage it is engaged in. After all, the highway damage and use is the result of the vehicle, not of the use to which it is put.

The revenues to be derived from this gross ton-mile tax are extra revenues. They do not include the license and registration fees or gasoline taxes.

If the Kansas tax were adopted, New Jersey could realize a minimum additional revenue of $15,955,500 from trucks registered in New Jersey. The New Mexico plan would mean $17,385,000. The West Virginia gross ton-mile tax would swell the state coffers by $10,237,000. If the Oregon gross ton-mile tax were used, New Jersey could realize $26,533,500. When we add to these totals the revenues which should be derived from out-of-state truckers, the estimate of $20,000,000 in total possible new revenue is seen to be conservative indeed. This would be over and above the present income from registration and gas tax.

For your further information, the enclosed supplement outlines these taxes in more detail and also includes the possible revenues under the plans of the other eight states which now use a gross ton-mile tax.

I might add that New Jersey has too long been lenient in her taxing policies of highway users. As has been pointed out, you and I and millions of other automobile owners have been overpaying, while the commercial users of the highways have been underpaying. In fact, the total

highway user revenue which New Jersey derives from heavy trucks is next to the lowest of any of the 48 states.

Again I should like to quote the Newark News. On December 2, Albert Skea wrote that "the total highway-user charge in New Jersey for operating a 10-ton tractor-trailer with a maximum gross weight of 40,000 pounds paid a total of $541.50: $204 registration fee, $337.50 gas tax on 45,000 miles at four miles per gallon. Forty-six other states have higher user fees. For example, in Oregon, thanks to the addition of a mileage fee, the same operator would have to shell out $1,467, and in West Virginia, the 'bite' would total $1,913.16."

Gentlemen, I want to repeat my plea for the most tax-burdened citizens in New Jersey: property owners. As a representative of New Jersey Automobile Owners, I have pointed out that our members are now paying far more than their fair share of highway costs. Highway users do contribute substantially to state revenues, but they contribute only 38 per cent of the total moneys spent for our roads and highways. The alarming fact, I repeat, is that 10 years ago highway-user revenues paid for 87 per cent of highway costs. Each year property owners are paying more and more for highways.

We all know that there is a grave need for additional revenue in our state. We know that there should be more schools and better educational equipment. We know that our welfare needs are growing, that our housing problem is far from solved, and that there should be new state parks and playgrounds. Our cities and towns, many beset with freightening tax rates, are asking for greater state aid to ease the local tax burden. Our counties need help for their roads and services.

We believe that many of these needs can be properly met by adopting the gross ton-mile tax. This would help to relieve many citizens from paying twice for highways: first as highway users, second as property owners.

We urge that these new revenues from highway users be applied to highway costs, thus making more local taxes available for the purposes for which they were originally intended: education, recreation, protection and services.

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Gentlemen, we urge that your Commission study the gross ton-mile tax. It is a fair levy that seeks only to allocate the costs of our streets and highways against the users. It is an intelligent approach to a problem that faces all states and especially New Jersey. It is a solution to a vexing revenue problem that has been found successful in 14 other states.

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EXHIBIT P-86

## SUPPLEMENTARY DATA TO STATEMENT MADE BY JULES TEPPER, COUNSEL FOR THE NEW JERSEY AUTOMOBILE OWNERS, INC.—TRENTON, DECEMBER 14, 1949

Fourteen states already have revised their highway-user tax systems to include ton-mileage as a basis for taxation.

The following table shows the minimum additional income New Jersey could obtain by adopting any one of the tax systems in force in nine of these states. The table shows only the added highway-user fees which would be paid by all the five-ton rated trucks and 10-ton rated tractor-semitrailers registered in New Jersey. Included in the former category are all trucks with a gross weight of from 27,000 pounds to 40,000 pounds and, in the latter group, all trucks with a gross weight of 40,000 pounds or more.

Therefore, total additional revenues indicated are a minimum for three reasons:

1. Out-of-state trucks, comprising an estimated 25 per cent of New Jersey truck traffic, are almost completely excluded from the calculations. Taxing them would add materially to the amounts shown.
2. The per-truck fees shown for the five-ton and 10-ton rated vehicles have been applied to heavier trucks, although the heavier trucks would pay higher fees.
3. All trucks weighing less than 27,000 pounds gross have been excluded from the calculations, although the great majority of them would also pay additional user fees.

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Necessary data on the five-ton and 10-ton rated vehicles follow:

| Trucks | Rated Capacity | Unladen Weight | Load Weight | Gross Weight | Axles | Approx. Mileage | Miles Gallon | Number Registered |
|---|---|---|---|---|---|---|---|---|
| 5-ton truck | 5 tons | 6 tons | 7½ tons | 13½ tons | 2 | 34,000* | 6 | 15,000** |
| 10-ton tractor semi-trailer | 3 tons-tr.<br>7 tons-semi. | 9,500 lbs.<br>8,500 lbs. | 11 tons | 20 tons | 3 | 39,000* | 4 | 21,000** |

* Mileage estimate is based on an average of similar estimates made by the Griffenhagen study in Illinois, "Digest of State Laws Pertaining to the Regulation and Taxation of Motor Vehicles," by J. C. Greenway and J. H. Hays, and figures released by the American Trucking Association. Mileage is assumed to be traveled entirely within each state.

** Truck registration figures are based on a loadometer survey made in 1948 by the New Jersey State Highway Department.

Figures shown include all trucks with a gross weight of 27,000-40,000 pounds and 40,000 pounds and over, respectively.

| State | Name of Tax | Rate | 5-ton Truck Pays | 10-ton Combination Pays | 15,000 5-Ton Trucks Would Pay N. J. | 21,000 10-Ton Combs. Would Pay N. J. | Minimum Revenue N. J. Could Derive |
|---|---|---|---|---|---|---|---|
| Ala. | Mileage Tax | Variable See Note (a) | $170 | $ 292.50 | $2,550,000 | $ 6,142,500 | $ 8,692,500 |
| Colo. | Highway Compensation tax | 2 Mills Per Revenue Ton-Mile See Note (b) | $306 | $ 514.80 | $4,590,000 | $10,810,800 | $15,410,800 |
| Kansas | Gross Ton-Mile Tax | ½ Mill Per Gross Ton-Mile See Note (c) | $272 | $ 565.50 | $4,080,000 | $11,875,500 | $15,955,500 |
| Mich. | Gross Ton-Mile Tax | Variable See Note (d) | $ 68 | $ 78 00 | $1,020,000 | $ 1,638,000 | $ 2,658,000 |
| N. M. | Mileage Tax | Variable See Note (e) | $340 | $ 585.00 | $5,100,000 | $12,285,000 | $17,385,000 |
| Oregon | Gross Ton-Mile Tax | Variable See Note (f) | $765 (595)(g) | $1,131.00 (838.50)(g) | $8,925,000 | $17,608,500 | $26,533,500(g) |
| S. C. | Special Motor Carrier Tax | 1 Mill Per Load Ton-Mile See Note (h) | $200(i) | $ 257.40(i) | $3,000,000 | $ 5,405,400 | $ 8,405,400 |
| W. Va. | Ton-Mileage Tax | 1/8th Cent Per Ton-Mile See Note (j) | $212.50 | $ 487.50 | $3,187,500 | $10,237,500 | $13,425,000 |
| Wyo. | Ton-Mile Tax | Variable See Note (k) | $204 | $ 392.45(m) | $3,060,000 | $ 8,241,450 | $11,301,450 |

New Jersey currently imposes only two highway-user taxes on all vehicles: fuel tax and registration fees.

A 5-ton rated truck pays $122 for registration, $160.10 in fuel taxes (34,000 miles, 6 miles per gallon) for a total payment of $282.10.

A 10-ton rated tractor-semitrailer pays $204 and $292.50 respectively (39,000 miles, 4 miles per gallon) for a total of $496.50.

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## NOTES

(a) Alabama's mileage tax specifies a rate of 1/4 cent per mile per axle for intrastate carriers, one-third cent for interstate carriers. Figures shown are for intrastate carriers only.

(b) Colorado's tax is called a Revenue Ton-Mile tax. Revenue ton-mile age is determined by multiplying the load capacity, in tons, by the mileage, and multiplying the result by 60 per cent (.60), since each truck is assumed to be fully loaded only 60 per cent of its mileage.

(c) Kansas determines the gross tonnage by adding the unladen weight of the vehicle to twice the manufacturer's rated capacity. This figure is multiplied by the mileage to give the gross ton-mileage.

(d) Michigan's rate is two mills per mile for all trucks weighing 15,000 pounds or more. Weight is determined by adding unladen weight to twice manufacturer's rated capacity. Other rates are: 11,000 lbs. or less, one mill per mile; 11,000-15,000 lbs., 1-1/2 mills per mile.

(e) New Mexico's mileage tax is determined from the manufacturer's rated capacity. Rates are: 1-1/2 tons or less, 1/8th cent per mile; 1-1/2–2-1/2 tons, 1/4 cent per mile; 2-1/2–4 tons, 1/2 cent per mile; 4–5 tons, 1 cent per mile, and over 5 tons, 1-1/2 cents per mile.

(f) Oregon's rates vary depending on the declared maximum gross weight. Rates range from 7.5 mills per mile for trucks weighing 4–5 tons to 36.5 mills per mile for trucks with gross weight of 50,000 lbs. or more. Trucks with gross weight of less than 8,000 lbs. are exempted. The fuel taxes paid by each truck are deducted from the total ton-mile tax for each truck.

(g) Upper figures show total ton-mile tax; figures in parentheses show the ton-mile tax which would be paid after the fuel-tax payments have been deducted. Each truck, then, would actually pay the amount in parentheses in addition to the fuel taxes it must pay. Final amount is summation of figures in parentheses the additional revenue New Jersey could obtain.

(h) South Carolina determines load ton-mileage by multiplying actual load capacity by mileage and multiplying product by 60 per cent, since trucks are assumed to be fully loaded only 60 per cent of the mileage.

(i) South Carolina sets a $200 minimum on the ton-mileage tax which must be paid by five-ton rated trucks, and a $250 minimum for 10-ton rated combinations. The former's tax actually works out to $153; the combination's tax totals $257.40.

(j) West Virginia uses the manufacturer's rated capacity as the figure for weight in determining total ton-mileage.

(k) Wyoming's rate is one mill per ton-mile for trucks and tractors and 1-1/4 mills per ton-mile for semitrailers. Unladen weight is used.

(l) This figure is a total of: $185.25 for the tractor, $207.20 for semitrailer.

## SUPPLEMENTARY DATA TO STATEMENT MADE BY JULES TEPPER, COUNSEL FOR THE NEW JERSEY AUTOMOBILE OWNERS, INC.—TRENTON, DECEMBER 14, 1949

Fourteen states already have revised their highway-user tax systems to include ton-mileage as a basis for taxation.

The following table shows the minimum additional income New Jersey could obtain by adopting any one of the tax systems in force in nine of these states. The table shows only the added highway-user fees which would be paid by all the five-ton rated trucks and 10-ton rated tractor-semitrailers registered in New Jersey. Included in the former category are all trucks with a gross weight of from 27,000 pounds to 40,000 pounds and, in the latter group, all trucks with a gross weight of 40,000 pounds or more.

Therefore, total additional revenues indicated are a minimum for three reasons:

1. Out-of-state trucks, comprising an estimated 25 per cent of New Jersey truck traffic, are almost completely excluded from the calculations. Taxing them would add materially to the amounts shown.

2. The per-truck fees shown for the five-ton and 10-ton rated vehicles have been applied to heavier trucks, although the heavier trucks would pay higher fees.

3. All trucks weighing less than 27,000 pounds gross have been excluded from the calculations, although the great majority of them would also pay additional user fees.

Necessary data on the five-ton and 10-ton rated vehicles follow:

| Trucks | Rated Capacity | Unladen Weight | Load Weight | Gross Weight | Axles | Approx. Mileage | Miles/ Gallon | Number Registered |
|---|---|---|---|---|---|---|---|---|
| 5-ton truck | 5 tons | 6 tons | 7½ tons | 13½ tons | 2 | 34,000* | 6 | 15,000** |
| 10-ton tractor semi-trailer | 3 ton-tr.<br>7 ton-semi. | 9,500 lbs.<br>8,500 lbs. | 11 tons | 20 tons | 3 | 39,000* | 4 | 21,000** |

* Mileage estimate is based on an average of similar estimates made by the Griffenhagen study in Illinois, "Digest of State Laws Pertaining to the Regulation and Taxation of Motor Vehicles," by J. C. Greenway and J. H. Hays, and figures released by the American Trucking Association. Mileage is assumed to be traveled entirely within each state.

** Truck registration figures are based on a loadometer survey made in 1948 by the New Jersey State Highway Department.

Figures shown include all trucks with a gross weight of 27,000-40,000 pounds and 40,000 pounds and over, respectively.

| State | Name of Tax | Rate | 5 ton Truck Pays | 10-ton Combination Pays | 15,000 5-Ton Trucks Would Pay N. J. | 21,000 10-Ton Combs. Would Pay N. J. | Minimum Revenue N. J. Could Derive |
|---|---|---|---|---|---|---|---|
| Ala. | Mileage Tax | Variable • See Note (a) | $170 | $ 292.50 | $2,550,000 | $ 6,142,500 | $ 8,692,500 |
| Colo. | Highway Compensation tax | 2 Mills Per Revenue Ton-Mile See Note (b) | $306 | $ 514.80 | $4,590,000 | $10,810,800 | $15,410,800 |
| Kansas | Gross Ton-Mile Tax | ½ Mill Per Gross Ton-Mile See Note (c) | $272 | $ 565.50 | $4,080,000 | $11,875,500 | $15,955,500 |
| Mich. | Gross Ton-Mile Tax | Variable See Note (d) | $ 68 | $ 78.00 | $1,020,000 | $ 1,638,000 | $ 2,658,000 |
| N. M. | Mileage Tax | Variable See Note (e) | $340 | $ 585.00 | $5,100,000 | $12,285,000 | $17,385,000 |
| Oregon | Gross Ton-Mile Tax | Variable See Note (f) | $765 (595)(g) | $1,131.00 (838.50)(g) | $8,925,000 | $17,608,500 | $26,533,500(g) |
| S. C. | Special Motor Carrier Tax | 1 Mill Per Load Ton-Mile See Note (h) | $200(i) | $ 257.40(i) | $3,000,000 | $ 5,405,400 | $ 8,405,400 |
| W. Va. | Ton-Mileage Tax | 1/8th Cent Per Ton-Mile See Note (j) | $212.50 | $ 487.50 | $3,187,500 | $10,237,500 | $13,425,000 |
| Wyo. | Ton-Mile Tax | Variable See Note (k) | $204 | $ 392.45(m) | $3,060,000 | $ 8,241,450 | $11,301,450 |

New Jersey currently imposes only two highway-user taxes on all vehicles: fuel tax and registration fees.

A 5-ton rated truck pays $122 for registration, $160.10 in fuel taxes (34,000 miles, 6 miles per gallon) for a total payment of $282.10.

A 10-ton rated tractor-semitrailer pays $204 and $292.50 respectively (39,000 miles, 4 miles per gallon) for a total of $496.50.

## NOTES

(a) Alabama's mileage tax specifies a rate of 1/4 cent per mile per axle for intrastate carriers, one-third cent for interstate carriers. Figures shown are for intrastate carriers only.

(b) Colorado's tax is called a Revenue Ton-Mile tax. Revenue ton-mile age is determined by multiplying the load capacity, in tons, by the mileage, and multiplying the result by 60 per cent (.60), since each truck is assumed to be fully loaded only 60 per cent of its mileage.

(c) Kansas determines the gross tonnage by adding the unladen weight of the vehicle to twice the manufacturer's rated capacity. This figure is multiplied by the mileage to give the gross ton-mileage.

(d) Michigan's rate is two mills per mile for all trucks weighing 15,000 pounds or more. Weight is determined by adding unladen weight to twice manufacturer's rated capacity. Other rates are: 11,000 lbs. or less, one mill per mile; 11,000-15,000 lbs., 1-1/2 mills per mile.

(e) New Mexico's mileage tax is determined from the manufacturer's rated capacity. Rates are: 1-1/2 tons or less, 1/8th cent per mile; 1-1/2–2-1/2 tons, 1/4 cent per mile; 2-1/2–4 tons, 1/2 cent per mile; 4–5 tons, 1 cent per mile, and over 5 tons, 1-1/2 cents per mile.

(f) Oregon's rates vary depending on the declared maximum gross weight. Rates range from 7.5 mills per mile for trucks weighing 4–5 tons to 36.5 mills per mile for trucks with gross weight of 50,000 lbs. or more. Trucks with gross weight of less than 8,000 lbs. are exempted. The fuel taxes paid by each truck are deducted from the total ton-mile tax for each truck.

(g) Upper figures show total ton-mile tax; figures in parentheses show the ton-mile tax which would be paid after the fuel-tax payments have been deducted. Each truck, then, would actually pay the amount in parentheses in addition to the fuel taxes it must pay. Final amount is summation of figures in parentheses the additional revenue New Jersey could obtain.

(h) South Carolina determines load ton-mileage by multiplying actual load capacity by mileage and multiplying product by 60 per cent, since trucks are assumed to be fully loaded only 60 per cent of the mileage.

(i) South Carolina sets a $200 minimum on the ton-mileage tax which must be paid by five-ton rated trucks, and a $250 minimum for 10-ton rated combinations. The former's tax actually works out to $153; the combination's tax totals $257.40.

(j) West Virginia uses the manufacturer's rated capacity as the figure for weight in determining total ton-mileage.

(k) Wyoming's rate is one mill per ton-mile for trucks and tractors and 1-1/4 mills per ton-mile for semitrailers. Unladen weight is used.

(l) This figure is a total of: $185.25 for the tractor, $207.20 for semitrailer.

EXHIBIT P-87

For release in papers of
Thursday, January 12, 1950

From: Robert A. Fox
New Jersey Automobile
Owners, Inc.
155 Evergreen Place
East Orange, New Jersey

## BIG-TRUCK TAX EXPLAINED BY AUTO CLUB EXEC

### Ton-Mile Plan Would Net New Jersey Nearly $20 Million

Detailed information on his proposed $20,000,000 tax on heavy trucks was released today by Jules Tepper, counsel for the New Jersey Automobile Owners, Inc.

In a proposal to the State Tax Policy commission in Trenton last month, Tepper urged adoption of a "gross-ton-mile tax" to be levied against the heavy commercial vehicles. He said such a tax would yield nearly $20,000,000 additional revenue.

"The gross-ton-mile tax," Tepper said today, "should be levied against both New Jersey and out-of-state trucks, but would exempt all vehicles of gross weight of eight tons or less, such as local delivery and farm vehicles."

"Adoption of our plan would net the state approximately $19,500,000, in addition to the present user fees paid by trucks," he pointed out. "Nearly three-fourths of this amount would come from trucks weighing 15 tons or more," he added.

Tax rates suggested by Tepper are the same as those now used in Oregon. They range from 15 mills per mile for trucks weighing 8-9 tons to 36.5 mills per mile for vehicles weighing more than 25 tons.

The ton-mile tax figures are determined by multiplying each truck's estimated annual mileage within the state by its tax rate. Vehicles weighing more than 50,000 pounds (25 tons) for example, have a tax

rate of 36.5 mills per mile and travel an estimated 13,000 miles in New Jersey each year, according to Tepper's chart. The mileage tax for this type of vehicle, therefore, would be $474.50. The 12,500 trucks in this weight bracket alone would net the state $5,931,250 annually.

"Even with this added tax," Tepper stated, "heavy trucks would not be paying their fair share of highway costs. But at least this is a step in the right direction." Tepper referred to a recent article in the Newark News which stated that "big trucks fail to pay their share of highway costs by as much as $597.42 each, every year."

Tepper said his findings were based on figures reported publicly by the New Jersey Motor Vehicle Bureau; the State Highway Department and the American Trucking Association.

"We realize that pin-point accuracy in our calculations cannot be made with what information is available. However, we made the most reasonable estimates possible under the circumstances. In every case, minimum figures were used. There is certainly no exaggeration in these reports," Tepper asserted.

The Association counsel pointed out that thousands of heavy, out-of-state trucks use New Jersey highways annually. "These vehicles," he stated, "pay only a gas tax for this privilege if they buy their gasoline in New Jersey, which is not always the case. A gross ton-mile tax imposed on these trucks would partly compensate for the highway damages they cause."

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NEW JERSEY CITIZENS TAX STUDY FOUNDATION
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## QUESTIONNAIRE FOR ORGANIZATIONS:

In its Fifth Report to the Governor and State Legislature, the Commission on State Tax Policy asserts that New Jersey's lack of a long-range tax policy has led to a "mass of inequities that are almost unbelievable as the basis for the support of public services in a modern State."

The New Jersey Citizens Tax Study Foundation was formed to encourage better public understanding of New Jersey's tax problems. Its belief: that if enough people have enough information about the shortcomings of New Jersey's tax structure, it will be easier for the Governor and the Legislature to frame a constructive, long-range tax policy that will fit the needs of a growing state and serve the best interests of the people of New Jersey.

The major function of the Foundation is to provide facts on tax questions of public interest. In order that we may know the field where our research can be most helpful, we are asking the leading state-wide organizations to help us by answering this questionnaire.

If you do not wish to answer all questions, please answer as many as you wish. The statements preceding each question are based largely upon the Fifth Report of the Tax Policy Commission. If you wish additional background material, we will be glad to supply it.

EXHIBIT P-89

# QUESTIONNAIRE FROM THE NEW JERSEY CITIZENS TAX STUDY FOUNDATION

786 Broad Street, Newark 2, N. J.

## 1. DEMANDS FOR INCREASED SERVICES

Changing social and economic conditions have brought demands for increased state and local government services. Action to approve them is held up largely because of the problem of financing. It is generally recognized that the State cannot undertake new and additional services unless more tax money is raised to pay for them.

Following is a list of some of the major current proposals. Do you favor one or more? In what order of preference?

| Project | Estimated Cost | Yes | No | Order of Preference |
|---|---|---|---|---|
| **Requiring annual expenditures:** | | | | |
| Increased State School Aid | $47,000,000 | ..... | ..... | ..... |
| Bigger State Highway Program | 43,000,000 | ..... | ..... | ..... |
| Increased State Aid for Local Streets and Roads | 10,000,000 | ..... | ..... | ..... |
| More Control of Beach Erosion | 5,000,000 | ..... | ..... | ..... |
| State Care of Drug Addicts | 1,000,000 | ..... | ..... | ..... |
| Other ..... | | | | |
| ..... | | ..... | ..... | |
| **Requiring Capital Expenditures:** | | | | |
| State Medical College | $10,000,000 | ..... | ..... | ..... |
| State Veterans Bonus | 100,000,000 | ..... | ..... | ..... |
| Other ..... | | ..... | ..... | ..... |

COMMENTS:

## 2. STATE TAX REVISION

New Jersey's state government is financed mainly by special taxes from a few groups—selected sales, special businesses, and corporations. New Newsey does not at present use broad taxes such as those that now form the main tax bases of most other states. Thirty-three states now

have corporate net income taxes; thirty-one have personal net income taxes; twenty-eight states have consumers sales taxes. Eighteen states have combinations of these.

2a. If a replacement program were undertaken, or if new and important revenues are needed to support essential government services, which of the following do you favor, in order of preference?

| | FAVOR | OPPOSE |
|---|---|---|
| General Retail Sales Tax (exempting certain necessities such as food) | ..... | ..... |
| General Retail Sales Tax (without exemptions) | ..... | ..... |
| Individual Income Tax | ..... | ..... |
| Gross-ton-mile tax on heavy trucks | ..... | ..... |
| Corporation Income Tax | ..... | ..... |
| Gross Receipts Tax on all business | ..... | ..... |
| Other ..... | ..... | ..... |

2b. If it becomes necessary to use present state taxes in order to support essential government services, which of the following would you prefer be increased?

| | YES | NO |
|---|---|---|
| Gasoline Tax | ..... | ..... |
| Cigarette Tax | ..... | ..... |
| Alcoholic Beverage Taxes | ..... | ..... |
| Registration fees, passenger cars | ..... | ..... |
| Registration fees, commercial | ..... | ..... |
| Pari-mutuel Race Tax | ..... | ..... |
| Inheritance & Estate Taxes | ..... | ..... |
| Corporation Franchise Taxes | ..... | ..... |
| Other ..... | ..... | ..... |

COMMENTS:

475b

EXHIBIT P-89

FOR RELEASE: Thursday
January 10, 1952

From: Fred W. Goodwin, Executive Director
N. J. Citizens Tax Study Foundation
786 Broad Street, Newark 2, N. J.
MArket 3-1118

## POLL SHOWS GROUPS FAVOR GREATER STATE AID

Ten of New Jersey's largest and most active state-wide organizations believe the state government should assume a bigger share of the costs of New Jersey's school system, the New Jersey Citizens Tax Study Foundation reported this week.

Of the twelve groups replying to a questionnaire issued by the Tax Study Foundation, ten expressed strong approval of increased state aid for education. To get the money for this and other programs, 8 groups favor, while 1 opposes a personal income tax; 8 groups favor, while 4 oppose a general sales tax exempting food and medicine; 6 groups favor while 3 oppose a corporate income tax; and 9 groups favor, none oppose a mileage tax on heavy trucks.

Support for increased state aid for local streets and roads was also shown: 9 for, 1 against. An expanded highway program was favored: 7 to 1, and a state medical college was approved, 7 to 2.

Fred W. Goodwin, executive director of the Foundation, said that a detailed questionnaire was sent to a number of state-wide organizations in an effort to find out their stand on basic questions raised in the Fifth Report of the Commission on State Tax Policy. "As a fact-finding group," he said, "the Foundation takes no position, merely reports the results."

Generally, Goodwin said, the groups replying were opposed to any increase in present taxes on gasoline, cigarettes, alcoholic beverages, passenger car fees, inheritance and estate taxes, and corporation franchise taxes. An exception, however, was the approval by six groups of raising the tax on horse race betting. Only one organization opposed this change.

Among possible new taxes, the biggest support indicated in the replies was for the proposed mileage tax on heavy trucks, now under study by Governor Driscoll. At a press conference last week, the Governor stated that officials are studying the recently-enacted New York weight-distance law which taxes heavy commercial vehicles on the basis of highway use. Goodwin said that the Foundation is now completing a study on financing New Jersey highways and that "one of the significant findings is the fact that taxes on heavy trucks in New Jersey are the lowest in the nation."

"Throughout the answers," Goodwin said, "there was frequent reference to the overwhelming burden of Federal taxes, and recognition that governmental economy is extremely important. It was evident, too, that most of the groups realize that a program of broad tax revi-

sion is not likely to take place in any one year. Rather, there seems to be a belief that constructive action to improve the State's tax policies ought to be started, not only to provide revenues for essential government activities, but also to assure a fairer distribution of the tax load."

Groups which replied to the questionnaire were the New Jersey League of Women Voters, the New Jersey Bankers Association, the New Jersey State Council CIO, the New Jersey Farm Bureau, the State Grange, the New Jersey Federation of Business and Professional Women's Clubs, the New Jersey State League of Municipalities, the New Jersey Education Association, the New Jersey State Conference of the National Council of Jewish Women, the New Jersey Association of Township Committeemen, the New Jersey Exempt Firemen's Association, and the New Jersey Chapter of the American Veteran's Committee. The New Jersey Manufacturers Association also replied, but felt that "until the overwhelming Federal burdens are reduced, there should be no increased burdens of taxes levied either at state or local levels."

"These answers," Goodwin said, "will provide the basis for further research. They indicate a growing awareness of the need for tax revision and show that there is wide public support for action by the 1952 Legislature."

# # #

EXHIBIT P-94

FOR IMMEDIATE RELEASE

FROM: Henry W. Connor, Executive Director
Citizens Highway Committee
605 Broad Street, Newark 2, N. J.
MArket 2-3631

## THE YOUNG AND THE RICH NO LONGER SHOP DOWNTOWN

Downtown shopping areas are doomed unless cities take immediate steps to relieve traffic congestion and provide parking facilities. This is the warning issued by the Citizens Highway Committee on the basis of an opinion poll of New Jersey residents on the state's roads and highways.

The poll shows that two out of every three people in the state avoid driving in business and shopping districts in the state's big cities because of heavy traffic.

Even more significant for the future, said John Magovern, Jr., committee chairman, is the finding that the highest percentage of those who avoid downtown shopping is in the younger people and upper-income families.

"This is proof that immediate steps must be taken to provide highways into our major business and shopping areas," Magovern said. "Unless government officials recognize that the heart of the highway problem is in downtown areas, we will be faced with ghost cities. Realty values will drop, tax revenues will dry up, and millions of dollars in real estate investments will be destroyed."

The two most pressing problems, the poll showed, are inadequate streets and lack of parking facilities. Other important reasons cited for avoiding downtown areas were: double parking, poor traffic control, "lights aren't synchronized," and big trucks.

## FAVOR TRUCK TAX FOR FINANCING

When offered a choice of four different ways of raising money to finance a greater highway program, a majority of the people favored "an additional tax on heavy trucks

—MORE—

based on the miles they travel and the weights they carry over New Jersey highways." This rolled up twice as many votes as did the second choice—the end of "diversion" of highway-user funds, even if it meant new taxes.

The poll also showed that large segments of the public are aware of the seriousness of the problem, for seven out of every ten people polled said that New Jersey needs more highways. Eight New Jersey citizens feel that the state is spending too little money on its highways for every one who feels the state is spending too much. A majority of those having an opinion favor state bond issues to provide more funds for highway construction during the next few years. In favor were 49 per cent of those questioned; opposed were 39 per cent.

## STATE SHOULD HELP

"To those of us who are interested in the future of our state," Magovern added, "it is evident that there must be a new and realistic approach to this highway problem. So much of the traffic congestion is caused by conditions over which local officials have no control that it is logical that the state should use its powers and its revenues to help relieve traffic in our major cities. The alternative is gradual strangulation and ultimate decay of our big cities, with tremendous losses in ratables and tax revenues."

## RELIEVE REAL ESTATE

The poll also showed that nearly two out of every three people believe that real estate should be relieved of the burden of paying for the costs of local streets and roads, and that these expenditures should be met by highway-user taxes. "This is in sharp contrast to the present tax structure," Magovern pointed out, "where 82 per cent of the costs of local streets and roads is paid for by local property taxes

—MORE—

and only 18 per cent comes from gasoline taxes and car and truck license fees."

Magovern explained that in 1950 county and municipal governments spent $97,867,495 for roadways and received about $15,000,000 in State Aid. "Thus," he said, "local tax payers are forced to carry the major share of road costs."

The poll, "New Jersey Appraises Its Roads and Highways," was made in January by the Princeton Research Service.

The proposal of the State Tax Policy Commission for a ton-mile tax on heavy trucks received a boost recently when the conference on Interstate Cooperation urged their member states to "enact a weight-mileage tax to assure an effective and fair system of highway taxation."

New York State Senator Mitchell reported on the Oregon weight-mileage tax and said that this program had proved extremely successful. He pointed out that Oregon collected 18 per cent of its total highway-user revenues from commercial vehicles under this tax—"$5,480,368 of a total of about $30,000,000. This substantial sum was collected at the low cost of 4.2 per cent from the operators of 124,000 trucks."

On this basis, New Jersey could anticipate at least $20,000,000 additional revenue . . . a sum that would go a long way toward solving New Jersey's pressing highway problem.

—0—

EXHIBIT P-105

Fact Finders Associates, Inc.

## REGULATION HITS INDUSTRIAL GROWTH, NEW SURVEY SHOWS

Strongly adverse effects of excessive government regulation on industrial growth are one of the striking results of a survey of corporate revenues and tax payments just completed by Fact Finders, Inc., New York research firm.

Unpublished information provided by the leading companies in 13 major industries was the basis of the survey. It found gross revenue to have increased, on the average, 155 per cent in the 10 years from 1941 to 1951. The increases ranged all the way from 93.19 per cent for non-ferrous metal production to 408.75 per cent for over-the-road trucking, with the smallest increases significantly concentrated among the most-regulated industries. Railroad revenues showed a 97.50 per cent increase, and those of public utilities a 96.54 per cent gain.

"Non-ferrous metals, such as copper and nickel, are largely imported," the Fact Finders observe, "and both their importation and their domestic production are under government control. The railroads and utilities have not had as much opportunity as other businesses to increase their sales by expansion of plant facilities, nor have they had as much chance to adjust prices to meet inflated costs, because rates are under federal regulation."

The industries covered, and the revenue increase from 1941 to 1951 reported by each, appear in the following table (figures in parentheses refer to the number of companies reporting for each industry):

| | GROSS REVENUE INCREASE 1941-1951 |
|---|---|
| Trucking (23 companies) | 408.75% |
| Electrical equipment (3) | 240.42 |
| Miscellaneous manufacturing (24) | 229.79 |
| Rubber and tire manufacturing (7) | 218.85 |
| Auto and truck manufacturing (4) | 205.09 |
| Communications (5) | 180.97 |
| Chemical products (5) | 172.63 |
| Food products (9) | 161.10 |
| Retail trade (13) | 142.83 |
| Iron and steel (8) | 119.35 |
| Railroads (24) | 97.50 |
| Public utilities (25) | 96.54 |
| Non-ferrous metals (5) | 93.19 |

The position of trucking at the top of the list, with a gross-revenue increase almost double that of the next industry, was related by the Fact Finders to the fact that trucks have been assisted in their growth

—MORE—

through the use of public highways. "Because of public contributions to the cost of the streets and roads it uses, trucking must be considered the only industry among those studied which does not finance all its own plant and is, indeed, the recipient of an indirect subsidy," the Fact Finders report.

The Fact Finders also collated and compared tax information, and found total taxes paid by the 151 reporting companies to stand at 11.6 per cent of revenue received. Public utilities pay proportionately the most taxes, with 1951 taxes equal to 21.81 per cent of 1951 gross revenue. Communications (17.25 per cent), non-ferrous metals (16.94 per cent) and chemicals (16.78 per cent) rank next. Lowest on the list are food products, with taxes equal to 3.04 per cent of gross revenue, retail trade with 5.30 per cent and trucking with 6.83 per cent.

(The tax totals include taxes paid by the companies only; direct consumer taxes are excluded).

Over-all, the survey suggests that trucking is in a favored position today. When the industries reporting the greatest gross-revenue increases are compared, trucking can be seen not only to be leading by a wide margin in percentage of revenue increase, but also to be paying proportionately much the smallest taxes.

| | GROSS REVENUE INCREASE 1941-1951 | % TAXES OF GROSS REVENUE 1951 |
|---|---|---|
| Trucking | 408.75% | 6.83% |
| Electrical equipment | 240.42 | 15.46 |
| Miscellaneous manufacturing | 229.79 | 12.76 |
| Rubber and tire manufacturing | 218.85 | 14.58 |
| Auto and truck manufacturing | 205.09 | 13.48 |
| Communications | 180.97 | 17.25 |
| Chemical products | 172.63 | 16.78 |

A comparison of the two transportation industries, trucking and railroads, reveals that the 6.83 per cent of gross revenue paid by trucking in taxes is about two-thirds as much as the 10.43 per cent paid by the rails. The rails contend that this relationship is particularly important because their own taxes contribute nothing to the support of their roadbeds, which they must build and maintain themselves, while trucking's lower taxes represent that industry's total contribution to its roadbed.

The companies queried for the survey were the leaders in their respective fields. The Fact Finders declare that the selected firms in each industry do 50 per cent or more of that industry's total annual business.

Details of the survey's findings are attached.

# # #

Fact Finders Associates, Inc.

## INDUSTRY TAX STUDY

(All dollar amounts are in millions of dollars)

| | 1941 GROSS REVENUE | 1951 GROSS REVENUE | PER CENT INCREASE | INCOME TAXES, 1951 | | OTHER TAXES, 1951 | | TOTAL TAXES, 1951 | |
|---|---|---|---|---|---|---|---|---|---|
| | | | | Paid | % of '51 gr. rev. | Paid | % of '51 gr. rev. | Paid | % of '51 gr. rev. |
| Automobile & truck manufacturing | $3,507.70 | $10,701.66 | 205.09% | $1,070.23 | 10.00% | $372.35 | 3.48% | $1,442.58 | 13.48% |
| Chemical products | 810.29 | 2,209.12 | 172.63 | 329.12 | 14.89 | 41.67 | 1.89 | 370.79 | 16.78 |
| Communications | 1,298.69 | 3,648.96 | 180.97 | 339.35 | 9.30 | 290.21 | 7.95 | 629.56 | 17.25 |
| Electrical equipment | 1,057.63 | 3,600.42 | 240.42 | 387.03 | 10.75 | 169.47 | 4.71 | 556.50 | 15.46 |
| Food products | 2,830.53 | 7,390.55 | 161.10 | 119.06 | 1.61 | 105.35 | 1.43 | 224.41 | 3.04 |
| Iron & steel | 3,776.27 | 8,283.08 | 119.35 | 888.47 | 10.73 | 186.30 | 2.25 | 1,074.77 | 12.98 |
| Miscellaneous manufacturing | 1,116.20 | 3,681.09 | 229.79 | 377.02 | 10.24 | 92.86 | 2.52 | 469.88 | 12.76 |
| Non-ferrous metals | 571.67 | 1,104.41 | 93.19 | 147.87 | 13.39 | 39.27 | 3.56 | 187.14 | 16.94 |
| Public utilities | 1,351.59 | 2,656.38 | 96.54 | 279.12 | 10.50 | 300.20 | 11.30 | 579.32 | 21.81 |
| Railroads | 3,702.52 | 7,312.64 | 97.50 | 315.06 | 4.31 | 447.92 | 6.13 | 762.98 | 10.43 |
| Retail trade | 3,501.75 | 8,503.13 | 142.83 | 344.10 | 4.05 | 106.69 | 1.25 | 450.79 | 5.30 |
| Rubber & tire manufacturing | 1,197.00 | 3,816.65 | 218.85 | 318.80 | 8.35 | 237.80 | 6.23 | 556.50 | 14.58 |
| Trucking | 72.77 | 370.23 | 408.75 | 10.39 | 2.80 | 14.91 | 4.03 | 25.29 | 6.83 |

EXHIBIT P-112

FROM: Joab K. Mahood, Secretary
Pennsylvania State Grange
Telegraph Building
Harrisburg, Penna.

FOR IMMEDIATE RELEASE

The proposed weight increases in Senate Bill 615 would give Pennsylvania's long-haul truckers 12 per cent more revenue for a license fee hike of one tenth of one percent. These are the findings of a Pennsylvania State Grange analysis of ICC reports submitted last year by Class I Pennsylvania motor carriers.

The summary of reports of 15 typical motor carriers shows that these companies would increase their gross annual earnings by more than $3,500,000 for added license fee payments of only $26,352.

The extra revenues would result from the higher pay loads granted by the bill which raises gross weight limits from 45,000 to 48,000 pounds for single axle semi-trailers and from 45,000 to 60,000 pounds for tandem axle semi-trailer combinations.

At a minimum, the study shows, the higher pay load would be one and a half tons per vehicle per trip. The increased license fee would not exceed $37 per vehicle per year. Since the average return per ton of pay load is $10, the report points out, practically all Pennsylvania big truckers would be able to pay their higher license fees in two or three trips.

According to ICC reports, the Grange showed, the 15 Class I motor carriers showed a 24.17 per cent net return on their depreciated investment. This compares with a net return of 9.8 per cent for all industry in the United States during the same period. Under S 615, revenues would rise 12.61 per cent while license costs would increase only one tenth of one percent.

GRANGE ... 2

How trucking firms would profit was illustrated by detailed operating figures from the 15 Pennsylvania firms. For example, a Pittsburgh firm with 37 tractor-semi-trailers and operating revenues of $2,096,796 paid annual license fees of $11,014 in Pennsylvania. If S 615 should become law, the Company would show an estimated rise in revenue of $218,984 on payment of additional registration fees of $1579. Percentage-wise, this would mean a 10.44 jump in revenue for an expense rise of 0.08.

Joab K. Mahood, Grange Secretary, said that this study showed another reason why S 615 should be defeated. He pointed out that registration fees for heavy trucks in Pennsylvania were among the lowest in the nation and that out-of-state trucks now make no payment unless they purchase fuel here. "This whole problem of big trucks and highways," Mahood stressed, "should be thoroughly studied. The Legislature should know from the Maryland Road Tests how much highway damage is caused by big trucks and a committee should be appointed to study the weight-distance tax as proposed early this year by the Grange."

Exhibit P-118

DIGEST OF STATEMENT OF H. A. THOMSON, Secretary of the Pennsylvania State Association of Township Supervisors urging Veto of S615.

Continuing their opposition to any increase in truck weights as would be permitted under the Big Truck Bill, the Pennsylvania State Association of Township Supervisors asked Governor Fine to veto the bill and create a study committee to "learn what weights our highways can stand and how highway taxes can be most fairly distributed." Thomson called the bill "unfair, unclear, and discriminatory to township roads" for these reasons:

1. As township roads are not primarily financed from motor license fund money, the costs of the extra damage caused by heavier trucks must be paid for by the small local taxpayer.

2. S615 is too mixed and complex to be properly interpreted.

3. S615 calls for lower fines for violating weight limits on the posted township roads and bridges, which were never built for heavy loads, than on the unposted, sturdily-built state highways. At the present time all fines for overloading are $50. Under S615, the fine would be $50 if the overload occurs on township roads or bridges, $100 plus $2 for each extra 100 pounds if the overloader were caught on the state highway.

4. The 5 percent tolerance in S615 is an attempt to circumvent the law as interpreted by judicial decision, and raises the legal weight limits: of axle loads from 20,000 to 21,000 pounds; of the heaviest truck combination from 62,000 to 65,100 pounds. In Dauphin County Court, Judge Brahm said, in Dillmer Transfer Co. vs. Otto F. Messner: "The 5 per cent tolerance is in no sense an increase in weight limit". Yet S615 freezes the 5 per cent tolerance as part of the legal weight.

5. S615 makes reduction of the overload permissive and then only to the gross load limit plus the 5 per cent tolerance. The present law requires that the overload must be removed regardless of tolerance.

6. Studies should be made of the possibility of classifying roads according to weights which they can safely carry. Thus: 30 ton trucks might be permitted on major highways; secondary roads might be limited to 22½ ton vehicles; and township roads restricted to 15 tons or less.

7. Even with the increased fee of S615, Pennsylvania ranks 46th of the 48 states in taxes levied on each 20 ton tractor trailer unit.

## Exhibit P-119

Summary of statement of Joab K. Mahood, Secretary of the Pennsylvania State Grange, in opposition to approval of Senate Bill 615.

In urgina Governor Fine to veto S615, the Big Truck Bill, Joab K. Mahood, secretary of the Pennsylvania State Grange said, "Probably no bill of its kind, opposed by so many and supported by so few, ever passed any Legislature." He stressed that the vast majority with a thick volume of editorial reprints which he submitted as Exhibit A.

Specifically, Mahood listed these points of opposition:

(1) S 615 would legalize weight limits that would jeopardize the huge investment in highways, endanger thousands of bridges on both primary and secondary roads.

(2) Passage of S615 would lead to the destruction of a large part of the Pinchot Roads which have proved so important to rural people.

(3) Highways are not expendable during this emergency period when costs are high, materials and manpower short.

(4) Other states with higher weight limits are seeking to reduce truck weights. Ohio recently found it necessary to cut weight limits of big trucks entering from the new Turnpike extension.

(5) America cannot afford to build roads to suit traffic needs and must make traffic conform to the capacity of the roads we have.

(6) According to a survey conducted by the Council of State Governments, practically all State Highway Departments, including that of Pennsylvania, hold excessive truck weights responsible for undue deterioration of our roads, besides being responsible for many accidents.

EXHIBIT P-126

# "WHY THE RAILROADS MUST DO A BETTER PUBLIC RELATIONS JOB"

Address made before the

NEW YORK RAILROAD CLUB

By

Wm. WHITE, President

The Delaware, Lackawanna and Western Railroad Company

At

Hotel Commodore, New York City,

Thursday, April 17, 1952.

I wish to congratulate the New York Railroad Club for the progress it has made in the last few years in discussing matters that are of mutual interest to its members, whether their primary field of business be railroads, industry or finance. I hope that the new type of program initiated tonight, whereby all members are invited to participate in a dinner meeting, will prove to be successful.

It is a distinct honor to be invited to speak before the Club on this occasion. We have a subject of the highest importance to discuss.

My audience contains people engaged in many kinds of business, but by and large they are railroad men or railroad supply men. The railroads buy your goods and sell you transportation. You are buyers of transportation and sellers of merchandise. In business we enjoy a connubial relationship—compatible I hope—that makes us dependent on each other. If that happy state is to continue, there are a lot of public relations activities on which we need to develop more cooperation than ever before. Not to correct any flaw in our relationship with each other, but to defend our mutual interests—the profits arising from our association—from threats that come from outside of our own ranks.

I speak not as an expert on public relations, although I do not consider that public relations requires expertness, because it is not of a technical nature, it is something that enters into our every-day business life and it matters not

what kind of business we are in. Too often—I fear—public relations is looked upon as a staff function as contrasted from a line function; in too many businesses the organization conceives the public relations job to be that of the man whose title bears the designation, whereas public relations is the job of everybody in every business organization, from the chief executive right down through the ranks.

My subject to night is WHY THE RAILROADS MUST DO A BETTER PUBLIC RELATIONS JOB. There are two kinds of public relations, but they are inter-dependent one on the other.

The first is that type of public relations which has as its basis the right kind of service to the public; which recognizes that the men at our ticket windows, on our trains, and all those having contacts with shippers and passengers are our primary ambassadors of good will. It is the type of public service that makes a railroad journey a pleasure, provides relaxation and a good sleep; where, in commuter service, the trainmen loan money to the commuters who have forgotten their wallets and gotten aboard with neither ticket nor cash; where there are no freight car shortages and freight moves with dispatch and without damage; where people have no difficulty in arranging their journeys and making reservations.

The railroads have provided a lot of new equipment and many railroads have programs for training their employees

in the methods of service and salesmanship. But this is not enough. We must inculcate into every railroad employee the idea that good service is the foundation of all public relations.

If I were addressing only railroad men, I would dwell on this type of public relations in greater detail. But we railroad men know what good service is and we should spare no effort to provide it. We must give it greater impetus than ever before, because if we are going to have a relationship with the public such as we are seeking, the public must be our friends and we make friends only by rendering willingly good service in every aspect of our business.

Speaking a few months ago before the American Management Association in Los Angeles, Mr. Keith S. McHugh, President of the New York Telephone Company, outlined the policy that has guided the Bell System for so many years. Relating to the obligations of the Bell System to its customers and investors in the telephone business, he stated that policy as follows: "Obviously the only sound policy that will meet these obligations is to furnish the best possible telephone service at the lowest cost consistent with financial safety." He added that "this policy is bound to succeed in the long run and there is no justification for acting otherwise than for the long run." Continuing, he said that "this obligation to the public recognizes equally its responsibility to its employees, to whom must be paid salaries and wages in all respects adequate and just, and

to make sure that individual merit is discovered and recognized."

That policy, I believe, we can all adopt for the railroads with great benefit to our industry. Remember what it encompasses:

1. The best possible railroad service.
2. At the lowest cost consistent with financial safety.
3. Salaries and wages in all respects adequate and just; and
4. That individual merit is discovered and recognized.

But do not forget that all four of these guiding principles are inter-related—we must successfully accomplish all of them if our business is to be conducted with satisfaction to the public, to our investors and to our employees.

The other kind of public relations, and the one which I particularly wish to discuss tonight, has to do with problems of the railroad industry that concern all of us. The fact that we have had a railroad problem in this country for many years stems from the fact that the railroads have been taken too much for granted and that the railroads themselves have not attacked the problem in the right way. They have not taken that problem to the bar of public opinion, nor have they convinced American businessmen and the public generally that the railroad problem is one to which they must give heed in their own interest and not in the interest of the railroads alone.

This problem is not nearly so serious to railroad management, as such, as it is to the general public, and particularly to American businessmen. It matters not one bit whether a few railroad Presidents who are close to retirement age become Federal Managers and have their salaries reduced. Much more serious than that would be the effect upon all people and all business of government ownership and operation of our railroads, because no government has ever been adept at running a business and we could expect only poorer service and higher and higher deficits saddled on the American taxpayer.

There is no public demand from any quarter for Government ownership of our railroads. But let that provide no comfort, because government ownership could come easily by default through a refusal of the American public, and particularly the American businessmen, to take heed of the danger signals which stem from:

1. Regulatory laws which have become archaic and which seek to regulate the railroads as a monopoly, which they are not.
2. From regulatory procedures that are outmoded and take too much time.
3. From a type of political thinking that permits the use of public funds in the form of subsidy in aid of other forms of transportation and expects railroads—paying their own way—to compete in the transportation markets of the country.

4. From a type of economic philosophy existing in our regulatory agencies that fails to recognize the necessity for railroads earning high profits when doing a high volume of business.

5. From an inadequate rate of return—which is simply another expression for inadequate profits—over a long period of years, which stems from the causes enumerated above—and which are causing an erosion of capital and makes the investment of money in railroad securities a risk that is too great for the investor.

These, as I see them, are the fundamental aspects of the railroad problem which need correction. Correction must come from the halls of Congress, from the legislative assemblies of each State, and from the Federal and State regulatory agencies, and it is to the bar of public opinion that we must take these problems. Public opinion—which is the goal of public relations—comes from the individuals and the groups back where the voters live, when they are awakened to the fact that things are going on that threaten their security, their future and their own independence of action. In other words, public opinion comes from all of our home towns, from the farms and from articulate groups.

The railroads have been so long under the iron fist of regulation that many of the very industries which depend

upon railway transportation for their economic lives simply consider it routine that the railroads labor under archaic regulation. We must accept the principle of regulation of the railroads. But that regulation should never be punitive and should be only in a degree—and no more—than is necessary in the public interest and which recognizes that the fundamental laws of economics apply as well to regulated railroads as to all other types of business operating under our competitive capitalistic profit system.

For many years the railroads alone were regulated; then came other public utilities. It may be well here to recall what has happened in the last few decades. Federal control has spread into the fields of power, communications and agriculture as policing authorities. Not content with that, subsidies with tax funds then were used to extend further the encroachment of government control over industry and enterprise.

The regulation of securities exchanges, coupled with broadened powers over all commercial banking granted to the Federal Reserve System, actually made the Government the arbitrator of all credit required for expansion of industry. Using subsidy as a bait, the bureaucrats moved on into the field of private construction and public building, and set up the strictest kind of control over agricultural production and marketing. Finally, the occurrence of World War II gave the final excuse for a frontal attack on American industry. By using war powers and alleged emergency authority, a government supposed to protect our freedom has brought us to the pass where we are today.

Federal monies amounting to millions were plowed into the financing of new steel mills and placed under the control of an organization which could produce with very little regard for cost encountered by the industry itself because of the subsidy it received in cash and in kind.

In the aluminum industry, again war was made the excuse for the establishment of a subsidized competitor which is today one of the great producers of aluminum in this country.

Under the guise of flood control, a vast bureaucratic organization was set up in the Tennessee Valley providing power and navigation facilities, and the bureaucrats—hungry to set up other authorities in other Valleys—are continuing to threaten the life of private enterprise.

And so it goes, slowly but inexorably, accepted complacently and too often advocated by American businessmen when their industries benefit financially from such use of government money.

Just last week we had a dramatic example of government intervention in business when the President seized the steel mills in connection with a labor dispute. Whether there was legal sanction for such action I am not qualified to say and we can only hope that this fundamental question is decided in a court of equity strictly in accordance with our Constitution and laws. I mention it only because of the shocked surprise which greeted this action. In contrast with that astonished reaction, people forget the fact that the

railroads have been under government control for a year and a half. The railroad seizure is undoubtedly sanctioned by law, but the fact remains that even now the railroads are under the control of the government and regardless of the merits, or otherwise, it is not a happy state of affairs and one about which we should not be complacent.

So far as I am able to learn, the only industrial group outside of the railroads that has been constantly aware of the encroaching threat to the American way of life has been the power and light industry, which has fought unceasingly on all fronts against encroachment by government on what should be a competitive business. And even the power and light industry has had more failures than successes in its fight, because no single group—or for that matter no pair of industries—can wage a fight of this nature successfully.

We have just concluded a treaty with Canada which permits the diversion of more water from the Niagara River for the production of hydro-electric power on the American side. Five light and power companies have offered to provide the capital necessary to produce that power and the cost is estimated to be in the neighborhood of $350,000,000. But what do we see—a determined effort in the Congress and among the bureaucrats to have the government build these power facilities, and two such great exponents of the American way of life as our own New York Senators,

Irving M. Ives and Herbert H. Lehman, want the government to go into this business while existing power companies are ready, willing and able to do so.

There must be a genuine crusade in all industry awakened by the railroads to assert a new declaration of independence, which properly advocated, will win in the near future the overwhelming support of the people. When under the guise of emergency or some other excuse, practically every business is getting a dose of regulation and the usurpation by bureaucracy of the functions of private management, we will at least find some public understanding of the background in which the railroads alone have had to carry the fight for so long.

The Eastern Railroads have for some time been engaged in a definite program for the establishment of a modern national transportation policy. The campaign asks no special advantages. It simply seeks that transportation be put on a basis of fair returns for all types of transportation, based on the cost and value of services when stripped of crippling regulation and a maze of government subsidies thrown helter-skelter into highway, water and air services without regard to basic costs or values to shippers.

Behind this campaign each of the Eastern Railroads is taking every possible step to improve relations with the

public in basic services. We embarked upon this new public relations program because of mounting evidence that there was a growing public fear about the very distortions in government power which have crippled us so greatly in our business. We did not have to invent our arguments or go seeking blindly in a wilderness of ignorance for persons who might agree with us. A small but highly important and intelligent minority of thoughtful people already had begun to say the very arguments which applied to our case.

We had on our side a report written by the transportation task force for the Hoover Commission on Re-organization of the government. We had the report of a completely unbiased study made in great detail by the Brookings Institution. FORTUNE magazine published a survey about "The Transportation Mess", with statements no railroad official would have dared to make as an interested party in the debate.

The Senate Committee on Interstate and Foreign Commerce began a transportation inquiry, out of which has come already an astounding report which has come to be known as the "Bricker Report."

The National Grange—the first advocate of railroad regulation back in the 1870s—has perceived the danger signals and has come out publicly for a modernization of transportation laws and policy.

The Transportation Association of America—after three years of intensive effort by a group representing railroad,

highway, waterway and airway transportation, users of transportation and investors in transportation—is about to espouse a program looking to the modernization of our national transportation policy.

These are the facts with which the railroads are armed in this current public relations campaign, plus the very evident support of countless publications and other media of public expression.

We perceive it to be our job to put facts into the hands of enough people to create an eventual public understanding of our problem, which most surely will have its effect on legislation in the Congress.

The current program of the Eastern Railroads and the broader goals which we hope to achieve, rest with you just as much as with the railroads. If we were simply asking for some advantage for the railroads, we would not expect to make any progress at all and could not honestly ask your cooperation, because that would mean only that two groups—the railroads as your representatives and you gentlemen as its suppliers—were trying to pick up some extra nickels in profit.

And this is where we beseech your aid, both as business partners with us and as important spokesmen in the American economy.

It takes a long, hard pull to correct an error in public thinking—a much greater effort than usually is involved in passing the original hasty laws that probably were based on political expediency.

The railroads were the first victims of an improper kind of government regulation. Today we have the responsibility to lead the fight that will reverse the trend, to the great benefit of all business and of all the public.

All railroad men who are worth their hire must join the battle; but they cannot carry this fight by themselves. So we ask you and all American businessmen to join us in this public relations program. You and we, and all American business, are either going to go forward or sink together under the heavy hand of regulation. So we might as well get into the game and pitch together.

As you very well know, public opinion is not made in Washington, and that is why we need to carry the campaign into the offices, the homes and schoolrooms of all America.

We of the Eastern Railroads are carrying this story of facts out along the routes we serve, but necessarily our activity is limited by the time that we can devote to it and at the same time maintain efficient railroad operation requiring full time work by everyone of us. We put into this program spare time which we have to create, and I ask you to do the same.

If you wish to join this movement as advocates of the doctrine of freedom, you will find, as we have, that you don't need to break down doors to get a hearing, but that the doors are open wide to welcome you.

You will find ready audiences anxious to know the facts in virtually every local chamber of commerce—in the Rotary, Kiwanis and Lions Clubs, in taxpayer groups, among associations of home owners and Parent Teachers Associations—in fact, in virtually every type of civic or citizen organizations made up of people who are concerned about maintaining and improving the system under which we live.

Let's get into this thing and fight together. The Eastern Railroads promise you that they will supply any material which you and your companies can use, not to plead a special case for the railroads but to make an iron-clad argument that will comprise substantial weapons in this fight for a modernized transportation policy.

No government agency can exert more authority than the Congress gives it. And Congress is always quick to check tyranny when it finds the public opinion in revolt against it.

This fight transcends party lines or political parties. It finds its friends, when they are well informed of what is happening, in every political party and every group.

You probably remember Ernest Hemingway's book of a few years ago entitled "FOR WHOM THE BELL TOLLS." The theme was that when one man dies, a little bit of all mankind dies. The full quotation on which he based his story was, "Ask not for whom the bell tolls, it tolls for

everyone." If anything was ever true as it applies to business that certainly is true today. Years ago the bell tolled for the railroads. No one was very frightened then, but as the bells toll for others we gain understanding and frightened comrades.

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## ADDENDUM

Perhaps you would expect me to say something about the fact that the Interstate Commerce Commission in its decision of last Monday in Ex Parte 175 granted the railroads practically all they asked for in the way of increased rates and charges. We are pleased about the fact that the Commission granted substantially what we asked for. But I ask you to remember that the railroads did not ask for more than enough to offset the increases in wages and material prices to which they have been subjected, and the full amount of this increase—even if it results in no diversion to other forms of transportation—will not yet permit the railroads to earn an adequate return.

Most disappointing to us is the fact that the Commission would not permit us to include this increase in the basic rate structure. Instead it must be applied on our freight bills as a surcharge, and the increase is limited so as to expire February 28, 1954, a period less than two years, during which period it may be modified or amended by the Commission.

This is very unfortunate and ignores the fact that the railroads must do long-time planning; that they must finance their equipment purchases for periods of ten to fifteen years. Our capital improvement programs must

be projected ahead based on our best judgment as to what money we will have to spend. There always exists enough uncertainty with respect to the business cycle as to give pause when estimating our ability to finance an extensive capital improvement program. To add to that uncertainty, by having hanging over our heads the possibility that all of this increase in freight rates and charges will be lost come February, 1954, is most unfortunate.

EXHIBIT P-168

FOR RELEASE
AM's of Friday, Nov. 17

FROM: Bureau of Public Roads
Ohio Department of Highways
Columbus, Ohio

NEW YORK, Nov. 16—The nation's highways cannot stand up under wartime traffic demands if subjected to the pounding of excessive truck loads, an 11-state conference on road and safety problems was informed here today.

T. J. Kauer, Ohio's Highway director and chairman of the Inter-Regional Council on Highway Transportation, in a report prepared for delivery at the conference here, disclosed that a half-million dollar road test in Maryland, now only two-thirds complete, already offers evidence that "increased heavy loading might seriously disrupt the effectiveness of highly essential routes" in the event of all-out war and the resulting upsurge in truck traffic.

The report, before the 15th Annual Northeastern Regional Conference on Highway Safety and Motor Vehicle problems, also revealed that one phase of the test—involving the heaviest loaded trucks—had to be halted even though the test still has two more months to go.

"While we must await the completion of the tests for a thorough analysis, it stated, "surely the results already conclusively indicate that further increases in legal weights of commercial vehicles should be halted."

It urged that the "moratorium on upward revisions in truck weight limitations, as proposed at the Governors' Conference this year, should definitely and decisively be accomplished."

Kauer's report was presented to the conference in the Roosevelt Hotel here by William Van Breemen, research director of the New Jersey Highway Department. Kauer, himself, was unable to attend because of illness in his family in Columbus, Ohio.

The road test referred to is being conducted on a 1.1 mile section of Route 301 in southern Maryland under auspices of the U. S. Bureau of Public Roads and the highway departments of 11 states and the District of Columbia. It had its origin at the first meeting of the Inter-Regional Council on Highway Transportation in Columbus, Ohio, last spring, and the tests were started in June.

The Maryland experiment has established that damage to pavement increases heavily with truck weights, the report indicated. As of November 1, 18,000-pound single axle trucks had caused 135 feet of cracks in the road's surface; 22,400-pound single axle loads, 726 feet, and 34,000-pound tandem axles, 597 feet. The lane subjected to the pounding of 44,800-pound tandem axle trucks was shut down October 13.

"Extensive cracking first became most noticeable on the 44,800 pound lane and rapidly developed to such an extent as to require suspension of truck operations because of the hazards of operation and potential damage to the trucks," Breemen added.

Only 92,166 trips over the lane resulted in the "startling" total of 3,303 feet of cracks, he revealed.

"You might say that these are not normal loadings and that the tests are accelerated way beyond normal usage of our highways," Kauer's report continued. "This is not true of Ohio's highways and likewise I can well imagine that similar heavy truck traffic is traversing the highways of Ohio's sister states.

"With axle loads being applied to each section of the test pavement at an average frequency of about one per minute, it is apparent that many of our present highways are called on to withstand equal or greater applications of legal loads. Comparisons with several of Ohio's heavy truck routes reveals that heavy truck units and combination units are subjecting those pavements to greater frequencies of applications."

States included in the two-day conference here are: Connecticut, Delaware, Illinois, Kentucky, Maryland, Virginia, Wisconsin, Michigan, New Jersey, Ohio, Pennsylvania and the District of Columbia.

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EXHIBIT P-235

FROM: H. A. Thomson, secretary
Pennsylvania State Association Township Supervisors
225 State Street, Harrisburg, Pennsylvania

July 26, 195[illegible]

MEMO TO EDITORS:

Here are some further facts on Senate Bill 615, the Big Truck Bill. The measure is now before the House of Representatives and will probably be voted on soon.

If you agree with us that this measure should be defeated, we hope you will find these data useful in an informative editorial.

WHO IS OPPOSED TO THE PASSAGE OF S615:

Pennsylvania Motor Federation (AAA)..... 57 branches
Keystone Automobile Club
Pittsburgh Motor Club
Pennsylvania State Grange
Pennsylvania State Association of Township Supervisors
Pennsylvania Federation of Womens' Clubs
Congress of Industrial Organizations
United Mine Workers
Pennsylvania Society of Professional Engineers and many local and county organizations

WHAT ARE THE MAJOR PROVISIONS OF S615:

Increasing the legal weight limits of heavy trucks:

for single-axle semi-trailers: from 45,000 to 48,000 pounds
for tandem-axle semi-trailers: from 45,000 to 60,000 pounds

HOW MANY VEHICLES CAN NOW CARRY OVER 45,000 POUNDS LEGALLY?

There are less than 100 out of 424,214 commercial vehicles registered in Pennsylvania authorized to carry over 45,000 pounds without a permit. These few vehicles are tractor-full trailers. Two separate vehicles. They are the only ones who can legally haul 62,000 pounds.

THE LEGAL WEIGHT LIMIT IS 45,000 POUNDS FOR 99.99 percent of all trucks.

WHY DO THE TOWNSHIP SUPERVISORS OPPOSE S615:

BECAUSE the vast majority of Pennsylvania roads and bridges were not built to carry such heavy weights.

BECAUSE engineers are practically unanimous in their statements that big trucks cause highway damage.

HERE IS A SUMMARY OF THE ANSWERS TO THE QUESTION:

"What effects are heavy trucks having on Pennsylvania roads?"

THOMAS BUCKLEY, DIRECTOR OF PUBLIC WORKS FOR THE CITY OF PHILADELPHIA:

"Fortunately, we are able to regulate the speed of trucks and thus able to escape most of the terrific damage they do on the state roads. If truck weight limits are raised, it will jeopardize most of our recent bridges and many of those now being built at a cost of millions to Philadelphia taxpayers."

STREET COMMISSIONER GEORGE A. REUSSNER, BETHLEHEM:

"Damage in our city is terrific and truck overloads are to blame. No street in Bethlehem is designed to carry even the present truck loads and we must now entirely rebuild the main east bound traffic route due to its actual and complete destruction by heavy trucks."

ARTHUR C. THRONE, CHIEF ENGINEER OF DELAWARE COUNTY:

"No matter where we have set the legal limit for the loading of trucks, there have always been those who break the law to make a higher profit. We have got to tighten up the enforcement of weight regulations. The public has too much at stake in its roads and bridges to take any chances."

E. L. SCHMIDT, CHIEF ENGINEER OF THE PENNSYLVANIA DEPARTMENT OF HIGHWAYS:

"The Maryland Road Tests proved definitely that the heavy axle load, which the truckers want, will destroy our roads."

WILKES-BARRE CITY ENGINEER GUY WALKER:

"We are putting in heavier bases on our main streets: nine inches instead of six inches."

NORTHAMPTON COUNTY COMMISSIONER ARTHUR RILAND:

"Our excessive bridge and highway repair bills are easily traceable to overloaded trucks."

DIRECTOR OF STREETS, E. GENE SCHWEINBERG, NEW CASTLE:

"If trucks get off the main routes, they cause a great deal of damage."

McKEEPORT TRAFFIC INSPECTOR FRED MATHENY:

"There is no doubt that constant pounding by heavy trucks has ruined McKeesport Streets."

CHIEF ENGINEER JOHN D. STEVENSON, PITTSBURGH:

"We know that heavy trucks are tearing some of our streets to pieces."

And on July 23, 1951, a Pennsylvania Turnpike Engineer said: "Heavy trucks do the most damage. The heavier their loads and the higher the speed, the more damage they do."

WILL S615 HARM BRIDGES?

Yes. More than 60 per cent of the township bridges will be in danger of collapse if the weight limits are permitted to increase. There are 9,460 township bridges in Pennsylvania. Of these, 1,860 are rated "poor"; 3,996 rated "fair". All incapable of safely handling the proposed 30 ton loads.

DO OTHER STATES HAVE HIGHER WEIGHT LIMITS?

Yes. Several neighboring states permit heavier trucks, but Pennsylvania has a greater mileage of State highways than that of the six New England States plus New York, New Jersey, Delaware, and Maryland.

In states with higher weight limits, the highways have been so severely damaged by heavy truck traffic that the officials are either asking for large increases in truck fees, a weight-distance tax for heavy trucks, or a reduction in weight limits. In Ohio, Governor Lausche said:

"Large trucks with heavy cargos are definitely damaging highways . . . and are not constributing their fair share for the construction and maintenance of Ohio roads."

Governor Dewey of New York: "Maintenance and repair costs increase geometrically with the weight of the vehicle. Heavy trucks cause greatly increased highway expenditures."

In its latest issue of the Press Sheet the American Automobile Association has this to say about "ROAD DAMAGE":

When the road tests at La Plata, Md., began giving evidence that overloading tended to cause a breakup of the highways, the trucking industry promptly pointed out that these tests were not conclusive that, among other things, they pertained to only one type of road surface and one type of subgrade.

The arguments over the La Plata tests, and similar future studies will probably go on for years. But the State legislatures, which have the responsibility of providing funds for keeping highways operable, are evidently impressed that something has been damaging the roads and this year no less than nine States substantially upped their penalties for truck overloads.

Until it can be proved that heavy loads do not damage highways built for normal traffic, it is the course of wisdom for States to hold the line against any further increases in weight limits and enforce to the hilt the laws now on the books.

EXHIBIT P-273

THIS BASIC RELEASE WAS SENT BY THE MOTOR FEDERATION TO ALL LOCAL CLUBS WITH A REQUEST THAT IT BE FILLED IN AND TAKEN PERSONALLY TO THE LOCAL NEWSPAPER:

July 13th news letter

....., President (or Secretary) of the ..... Automobile Club, representing ..... motorists, today urged the local member(s) of the House of Representatives to reject the trucking industry's demands for heavier trucks and defeat the big-truck bill (S615) now pending before the lower house.

..... charged that heavier trucks would make Pennsylvania's highways more dangerous to motorists and would cost the state's highway-users and general taxpayers additional millions of dollars each year in highway maintenance costs.

Attacking what he termed the "Legislature's disregard for engineering facts and advice" ..... said the Commonwealth should wait for the final results of the Maryland Road Tests to determine the damage which heavy trucks inflict on highways.

"Pennsylvania has made a substantial payment for these tests," ..... said. "It would be a shameful waste of the taxpayers' money to increase weights before these tests are complete."

He said "A small, well-organized minority of heavy truckers is trying to take advantage of the great majority —the three million motorists in Pennsylvania."

"The ever-increasing tendency to permit heavier and heavier trucks must be halted if we are to protect our billion dollar highway system," he added.

EXHIBIT P-274

FROM: Joab K. Mahood, Secretary
Pennsylvania State Grange
Telegraph Building
Harrisburg, Pennsylvania

FOR RELEASE—Monday, August 13, 1951

[Handwritten notation—*P274*]

Defeat of the Big Truck Bill and enactment of a weight-distance tax would go far to solve two of the Legislature's knottiest problems: truck weights and additional revenue, Joab K. Mahood, secretary of the Pennsylvania State Grange, said yesterday. He urged that a commission be appointed immediately to study the proposals and report back later this year.

"Now that the Legislature is deadlocked on tax proposals," he said, "every source of new revenue should be studied. With the rising expense of maintaining truck-damaged highways, it is clear that there must be a permanent, sound system of road financing and proper protection for our highways and bridges. From the experience of other states, it seems evident that Pennsylvania can raise an additional $20,000,000 to $25,000,000 a year by making big trucks pay their fair share of highway costs."

Mahood pointed out that the proposed commission would have the advantage of factual data: (1) On truck damage to highways from the final report of the Maryland Road Tests to be released in October; (2) on the weight distance tax as recently enacted in New York State.

"As the Grange showed recently," Mahood added, "the passage of the Big Truck Bill would permit a handful of long-haul truckers to increase their earnings by millions while Pennsylvania would receive no more than an additional $37 per year per vehicle."

He said that Pennsylvania now receives no revenue from out-of-state trucks except a few pennies gas tax and that heavy truck fees here were among the lowest in the nation. For a 30 ton, four axle tractor-semi-trailer, he reported, Pennsylvania would charge a $297 registration fee com-

(more)

pared to total fees of $1134 in Illinois, $1400 in New York, $1115 in California, and $1567 in Florida. He stressed that scores of states are now studying ways to adopt the proposals of the Council of State Governments for the weight-distance tax on heavy trucks.

"While we are confident that the Big Truck Bill will be defeated because of the overwhelming public opposition," Mahood continued, "we recognize that this defeat does not solve the critical problem of highway maintenance and upkeep. A factual study by highway engineers and tax experts is sure to provide sufficient data to make an intelligent, sound, long-range solution possible."

x x x x

EXHIBIT P-283

Senate Bill No. 615—the Truck Bill—will:

1. Raise the maximum allowable gross weight limits for a large number of trucks and tractors and for a limited number of semitrailers and full trailers.

The greatest increase is given to tractor and tandem-axle semitrailer combinations, which will be permitted a 60,000-pound gross-weight limit instead of their present 45,000-pound limit.

The maximum gross weight limit for tractors and single-axle semitrailers is raised from 45,000 pounds to 48,000 pounds.

2. Raise the single-axle load limit for three-axle single-unit trucks from the present 18,000 pounds to 20,000 pounds, bringing the axle-load limit for this type of vehicle into line with the limit for all other commercial vehicles in Pennsylvania.

3. Allow a 5 per cent tolerance on all gross weight limits.

Therefore, although the bill sets a limit of 62,000 pounds for a truck and trailer, for example, the driver of such a vehicle cannot be arrested if the gross weight of his vehicle does not exceed 65,200 pounds.

The practical gross-weight limits, under this clause, become: 50,400 pounds for a tractor and single-axle semitrailer; 63,000 pounds for a tractor and tandem-axle semitrailer, and 65,200 pounds for a truck and full trailer.

4. Greatly stiffen penalties for violating gross-weight limits and establish, for the first time, a penalty for violation of an axle-load limit.

The top fine for violating gross-weight limits is now $50; the bill proposes to impose a fine of $100 plus $2 for each 100 pounds of overload.

The bill also proposes a fine of $25 plus $2 per pound of overload for violating an axle-load limit; at present there is no fine for this offense.

Engineers agree, however, that it is axle weight, not gross weight, which inflicts the greater road damage. Overloading of an axle, there-

fore, is considered in most states a more serious offense than violation of gross-weight limits and is penalized accordingly.

5. Empower a judge to impound an overloaded vehicle pending payment of fines but not to deprive the offender of his right to operate any other truck.

6. Require the driver of an overloaded truck to reduce his load on the spot.

7. Increase registration fees for those vehicles whose gross-weight limits are increased.

Maximum increase is for a three-axle truck and full trailer—$74, a rise of slightly more than 20 per cent over its present fee. The tractor and tandem-axle semitrailer, which is granted a 15,000-pound increase in its gross-weight limit (33 per cent rise) would pay $204 instead of its present $171.

8. Establish minimum braking surfaces, according to gross weights, and require trucks to have enough engine power to go up a 2 per cent grade at a speed of at least 20 miles per hour.

The average grade in Pennsylvania is 5 per cent.

9. Establish, for the first time, a tandem-axle load limit. The limit is set at 36,000 pounds, which is higher than the limit in most states but does represent a 4,000-pound reduction in the present allowable tandem-axle load.

The Truck Bill will NOT:

1. Reduce the present maximum allowable axle load of 20,000 pounds. An axle load limit of 18,000 pounds is recommended by the American Association of State Highway Officials and is in effect in 34 states. The Maryland Road Test—in which Pennsylvania participated —substantiates the AASHO's insistance upon this limit.

2. Raise the state's present maximum gross weight limit for any combination except that it does permit the 5 per cent tolerance and therefore, in practice, allows a slight increase.

3. Raise the maximum gross weight limits for more than hal trucks and tractors operating in this state and for the great ma of semitrailers and full trailers.

4. Add the burden of responsibility for weight-law violatio shippers or owners or lessees of overloaded trucks. At present, the driver is penalized. Studies in New Jersey, Ohio and Mar have shown that the trucking company or the shipper, or both, us is more to blame for overloading than the driver; some drivers r they have been ordered to drive overloaded trucks and threatened dismissal if they refuse.

A detailed analysis of the proposed changes in registration fee gross-weight limits for each type of vehicle is shown on the att pages.

Pennsylvania registers all commercial vehicles according to cl weight classifications and according to type of vehicle (truck, tra semitrailer, etc.). The vehicle's chassis weight determines the tration fee it must pay and the maximum gross weight (weight c complete vehicle plus weight of the maximum load) it may attai

The State divides motor carriers into four categories: (1) two trucks and tractors; (2) three-axle trucks and tractors; (3) one two-axle semitrailers and two-axle full trailers, and (4) three-axl trailers. Each of these categories is further divided into chassis-w classifications; each classification is assigned a registration fee a maximum allowable gross weight.

The classifications for each type of vehicle, the present and pro registration fees and the present and proposed maximum allo gross weights are as follows: (according to amendments to S 6 of 14 June):

## TWO-AXLE TRUCKS AND TRACTORS

| Class and Chassis Wt. | Present Fee | Proposed Fee | Present Gross Weight Limit | Proposed Gross Weight Limit |
|---|---|---|---|---|
| R—Under 2,000 | $ 16.50 | Same | 5,000 | Same |
| S—2,000-2,999 | 26.00 | Same | 7,000 | Same |
| T—3,000-3,999 | 35.00 | Same | 11,000 | Same |
| U—4,000-4,999 | 45.00 | $ 49.00 | 15,000 | 16,500 |
| V—5,000-5,999 | 70.00 | 77.00 | 19,000 | 21,000 |
| W—6,000-7,500 | 96.00 | 109.00 | 23,000 | 26,000 |
| Y—7,500-9,000* | 120.00 | 134.00 | 27,000 | 30,000 |
| Z—Over 9,000* | 175.00 | 192.00 | 30,000 | 33,000 |

*—The bill also proposes that the Y classification be set at from 7,500 to 10,000 and that the Z classification be set at everything from 10,000 up.

## THREE-AXLE TRUCKS AND TRACTORS

| | | | | |
|---|---|---|---|---|
| RZ—2,000-2,999 | $ 40.00 | Same | 12,000 | Same |
| SZ—3,000-3,999 | 50.00 | Same | 14,000 | Same |
| TZ—4,000-4,999 | 60.00 | Same | 16,000 | Same |
| UZ—5,000-5,999 | 98.00 | $106.00 | 24,000 | 26,000 |
| VZ—6,000-7,499 | 168.00 | 186.00 | 28,000 | 31,000 |
| WZ—7,500-8,999 | 186.00 | 203.00 | 32,000 | 35,000 |
| YZ—9,000-12,000 | 215.00 | 239.00 | 36,000 | 40,000 |
| ZZ—Over 12,000 | 250.00 | 294.00 | 40,000 | 47,000 |

## ONE- AND TWO-AXLE SEMITRAILERS AND TWO-AXLE FULL TRAILERS

| | | | | |
|---|---|---|---|---|
| A—Under 1,000 | 5.00 | Same | 3,000 | Same |
| B—1,000-1,999 | 8.00 | Same | 6,000 | Same |
| C—2,000-2,999 | 15.00 | Same | 10,000 | Same |
| D—3,000-3,999 | 25.00 | Same | 12,000-one axle | Same |
| | | | 16,000-two axles | Same |
| E—4,000-4,999 | 30.00 | Same | 14,000-one axle | Same |
| | | | 20,000-two axles | Same |
| F—5,000-5,999 | 45.00 | Same | 16,000-one axle | Same |
| | | | 24,000-two axles | Same |
| G—6,000 and over | 75.00 | | | |

$84.00-one axle; 18,000-one axle; 20,000-one axle
95.00-two axles; 26,000-two axles; 33,000 two axles

## THREE-AXLE FULL TRAILERS

| Class and Chassis Wt. | Present Fee | Proposed Fee | Present Gross Weight Limit | Proposed Gross Weight Limit |
|---|---|---|---|---|
| AZ—Under 3,000 | $ 40.00 | Same | 12,000 | Same |
| BZ—3,000-3,999 | 45.00 | Same | 15,000 | Same |
| CZ—4,000-4,999 | 50.00 | Same | 20,000 | Same |
| DZ—5,000-5,999 | 60.00 | Same | 26,000 | Same |
| EZ—6,000-6,999 | 75.00 | Same | 30,000 | Same |
| FZ—7,000-8,999 | 85.00 | Same | 34,000 | Same |
| GZ—9,000 and over | 100.00 | $130.00 | 36,000 | 47,000 |

To determine the maximum allowable gross weight of any combi tion (tractor and semitrailer or truck and full trailer) add the all able gross weights for each of the two units making up the combinat A 'U' class tractor, for example, in combination with an 'F" class sin axle semitrailer, may now gross 31,000 pounds; S 615 proposes increase the gross-weight limit of this particular combination to 32 pounds, with a 5 per cent tolerance; practical gross-weight limit, the fore, would be 33,125 pounds.

However, the combined gross-weight limit for certain tractors semi or full trailers will exceed the maximum weight limit establis for any vehicle and hence will be true only in theory. A 'ZZ' truck example, combined with a 'GZ' full trailer, should be able to gr 76,000 pounds now and 94,000 under the proposed bill. Since the sets the weight limit for a truck and trailer combination at 62 pounds, with a 5 per cent tolerance—making it about 65,000—the truck and 'GZ' trailer would not be allowed to exceed this limit rega less of the limits set for their individual classifications.

The maximum weight limits for combinations proposed in S are:

EXHIBIT D-57

FOR RELEASE, SUNDAY
August 12, 1951

[Handwritten notation
*CB Misc*]

FROM: H.A. Thomson, Secretary
Penna. State Ass'n Township Supervisors
227 State St., Harrisburg, Pa.

## SEES GAS TAX RISE IF TRUCK BILL PASSES

A rise in the gasoline tax to pay for the extra highway damage if the Big Truck Bill passes was predicted yesterday by H.A. Thomson, secretary of the State Association of Township Supervisors. The bill, S 615, would raise weight limits for tractor-semi-trailer combinations from 45,000 to 60,000 pounds.

Thomson said that the heavier weights would cause millions of dollars worth of damage to roads and bridges, few of which were built to carry 30 ton loads. "Pennsylvania now needs all its highway user revenues," he said, "to carry out its program of new and better highways. Any additional costs, such as the millions needed to repair truck-damaged roads and bridges, would have to come from higher gas taxes."

"Another cent or two on the gas tax," Thomson said, "would create an intolerable situation for the car owner. The pleasure-driving motorist would have to pay for highways damaged by commercial vehicles which use the public roads for private profit. As people who are close to the problems of road maintenance and finance the Supervisors are fully aware that heavy trucks not only severely damage many roads but also fail to pay their fair share of highway costs."

"Every legislator," Thomson added, "shold realize that the decision on this truck bill is a choice between voting for the public or for the trucks. A vote against the bill will retain and strengthen our highway system. A vote for the bill is a prelude to greater damage on our roads to destruction of many bridges, and to higher gasoline taxes."

In compliance with this action, the officials of the Pennsylvania State Grange not only opposed the Big Truck Bill, but introduced a Weight

a) Tractor and single-axle semitrailer: 48,000 pounds (Now 45,000)

b) Tractor-and tandem-axle semitrailer: 60,000 pounds (Now 45,000)

c) Truck and full trailer: 62,000 pounds (Now 62,000)

With the 5 per cent tolerance allowed under S 615, the practical limits are:

50,400 pounds

63,000 pounds

65,200 pounds

—0—

EXHIBIT P-291

# EMPIRE STATE TRANSPORT LEAGUE

ELEVEN NORTH PEARL STREET
ALBANY, N. Y.

CROMWELL WOODWARD, Chairman
Utica, N. Y.

E. L. Torbert
Syracuse, N. Y.

Norman J. Gould
Seneca Falls, N. Y.

Earl J. Colwell
Hudson, N. Y.

R. A. Cooley
Buffalo, N. Y.

C. R. Wycoff, Jr.
Buffalo, N. Y.

A. F. Crane
Buffalo, N. Y.

John Tritten
Utica, N. Y.

Charles J. Peters
Utica, N. Y.

Neil O. Sheldon
Schenectady, N. Y.

H. C. Richter
Schenectady, N. Y.

Mills Ten Eyck
Schenectady, N. Y.

Charles W. Coneway
Schenectady, N. Y.

J. W. Biggs
Rochester, N. Y.

Dr. Adrian Buyse
Rochester, N. Y.

[Handwritten notation:
*Van Riper*]

Dear Sir:

In keeping with our policy of promoting an intelligent understanding by progressive-minded citizens of transportation and its related problems in New York State, we are enclosing for your information a resolution adopted by the New York State Grange on behalf of its 142,000 members at their annual convention in Elmira, November 3.

Main points of the resolution are: (1) Heavy commercial trucks pay less than one-quarter as much in gas taxes and license fees per ton-mile of highway use in New York State as passenger cars and light trucks, and (2) the legislature should enact an "increase in big truck license fees so that they pay a fairer share based on use and benefits, of the costs of thoroughfares in the state."

While these two points are the essence of the resolution, there are other facts and recommendations contained in the Grange's resolution (attached) that we believe should command the attention of all citizens interested in the state's transportation policy.

Sincerely,

/s/ CROMWELL WOODWARD
Cromwell Woodward

EXHIBIT P-293

# RESOLUTION OF THE NEW YORK STATE GRANGE

Passed by its 1950 Annual Convention
Elmira, New York November 3
On behalf of its 142,000 farm members.

*TU* *35-45*

WHEREAS, the license fee for a typical farm-size truck in New York is e third highest for similar trucks in any state in the nation, while heavy tractor truck in New York pays the fourth lowest license fee r similar trucks in any state in the nation; and *Pa $250*

WHEREAS, trucks with an unladen weight in excess of 10,000 pounds *3.16%*
count for only 2½ per cent of all motor vehicles registered in ew York, but make a 28½ per cent use of this state's thoroughfares, ich results in New York's highway system bearing the third highest equency of heavy truck traffic of any state in the nation; and

WHEREAS, this state has a legal weight limit of approximately 32 as and an axle weight limit of 22,400 pounds which is among the ghest in the nation, and 4,400 pounds per axle over the limit recom- ended by numerous official agencies concerned with the conservation our highways, and

WHEREAS, the New York Temporary Commission on Agriculture ported that ~~$146~~,000,000 would improve all of the 26,600 miles of rmanent town roads, but will pay for only 737 miles of highway fficiently strong to support the relatively few heavily laden trucks; d

WHEREAS, a competent research organization employed by the Citi- ns Public Expenditure Survey reports that heavy commercial over- e-road trucks pay less than one-quarter as much in gas taxes and ense fees per ton-mile of highway use in New York State as pas- nger cars and light trucks.

OW THEREFORE BE IT RESOLVED that New York State Grange k the Conference Board of Farm Organizations to study state, county d town highway financing design and conservation, including

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Italics handwritten in original.

1. An increase in big truck license fees so that they pay a fairer share, based on use and benefits, of the cost of thoroughfares in the state, and

2. A reduction in the axle weight limit of big trucks to the 18,000 pound weight recommended by the American Association of State Highway Officials and endorsed by numerous official agencies; and

3. Vigorous enforcement of the truck weight laws to prevent damage to our roads and to reduce the safety menace of the highway boxcars.

4. More money from state-collected gas taxes and license fees for rural road improvement; this money to come from the savings in constructing less costly heavy-duty truck highways and a reduction in maintenance expense as a result of lowering truck weight limits and from big truck payments of higher license fees.

(Emblem) (Emblem)

PENNSYLVANIA SOCIETY OF PROFESSIONAL ENGINEERS
228 NORTH SECOND STREET • HARRISBURG
TELEPHONE HARRISBURG 4-0720

MEMBER
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS
J. Donald Carpenter, President John T. West, Jr., Secretary

## RESOLUTION ON OVERLOADING OF HIGHWAYS

WHEREAS, the rapidly rising costs of highway maintenance due largely to excess loads, are a matter of grave concern, and

WHEREAS, notwithstanding the liberal maximum load limits and sizes adopted by the various State legislative bodies and notwithstanding liberal standards recommended by recognized highway officials relative to highway vehicle sizes, speeds and weights, great damage to our highways has resulted from the failure of some highway users to respect and comply with these laws and standards, and

WHEREAS, the usability and safe condition of our highways is an important major factor in the defense of our country, and

WHEREAS, it is the obligation of Professional Engineers to take appropriate action in matters peculiarly fitting for engineers to judge concerning the general welfare, and

WHEREAS, the National Society of Professional Engineers in Annual Convention assembled in Minneapolis, Minnesota, on June 14, 15, 16, 1951, urged that each member State Society actively support programs of highway loading law enforcements, including special springtime restrictions or regulations, and further to actively support the legal adoption of the A.A.S.H.O. Standards in those States which now legally sanction sizes or weights in excess of those standards.

THEREFORE, BE IT RESOLVED that the Pennsylvania Society of Professional Engineers respectfully proffer its services and support, as a professional body of qualified engineers, to its respective State legislative bodies in the preparation and enactment of effective legislation to stop destructive practices, and be it further

RESOLVED that the Pennsylvania Society of Professional Engineers unqualifiedly support the principles set forth in Resolution No. 58, in the House of Representatives of the General Assembly of Pennsylvania, and be it further

RESOLVED that the Pennsylvania Society of Professional Engineers urges all highway users and shippers, whether public or private, to refrain from contributing either directly or indirectly to the abuse of public highway systems.

••••••••••

This resolution is adopted by the Executive Board of the Pennsylvania Society of Professional Engineers at their meeting on July 21, 1951.

/s/ J. D. CARPENTER
J. D. Carpenter
PRESIDENT

EXHIBIT D-7

EXHIBIT D-9

By T. J. Kauer

Director, Ohio, Department of Highways, and Chairman of the Inter-Regional Council on Highway Transportation which established the Maryland Road Test to determine the damage commercial vehicles are doing to the nation's highways.

The final report on the Maryland Road Test, to be presented at the annual meeting of the Highway Research Board in Washington January 15, offers more than a set of facts for highway engineers.

It offers, also, a warning to the nation that today's highway network simply can not stand the brunt of another all-out war effort.

During World War II, it became patriotic for the American trucking industry to pile unprecedented loads on commercial vehicles to keep the materials of war flowing.

The result was that our roads, never built to carry such weight, came out of the conflict literally broken to pieces and unable to carry the increasing heavy traffic that began rolling once the automobile and truck manufacturers had converted to peace time production.

Highway officials throughout the nation soon found their road systems inadequate, and were faced with the problem of remodeling their highway networks to handle the traffic of today and the future as well.

## REASON FOR TEST

That's the main reason why the Maryland Test Road was established. Road builders had to know just what caused our highways to break up and what might be done to prevent it.

Engineers long had suspected that heavy loads were mostly responsible for breaking up the roads, but had no indisputable proof. Selfish interests like the truckers, seeking to avoid tax increases, contended that freezing and thawing weather was the dominant destroyer.

The roadbuilding engineers knew that weather was an important factor, but they suspected, too, that weight had a lot more to do with road damage. They could look, for example, at the entrances to heavy industrial plants and observe that driveways carrying unloaded vehicles into the plant held up longer than drives carrying the loaded trucks away from the factory. They knew, too, that on roads like the famous Pennsylvania Turnpike the outside (or truck) lanes cost about twice as much to maintain as did the inside lanes, which, for the most part, are used by lighter and faster vehicles.

In an effort to settle the issue once and for all, Ohio's Governor Frank J. Lausche called a conference December 5 and 6 1949 in Columbus, O. Central Atlantic and Mid-Western States highway officials were invited. Responding were representatives from Connecticut, Delaware,

Illinois, Indiana, Kentucky, Maryland, West Virginia, Wisconsin, the Bureau of Public Roads, and the Council of State Governments.

Out of this gathering grew the Maryland Test Road, the first scientific road study of its kind ever conducted.

Page 2

A committee of engineers representing the various states, the Bureau of Public Roads, and the Highway Research Board of the National Academy of Sciences selected for the test a 1.1 mile section of portland cement concrete pavement on U. S. Route 301 nine miles south of La Plata in Charles County, Maryland.

The pavement was constructed in 1941. According to the Maryland State Roads Commission, the traffic to which it had been subjected included mostly automobiles and only a few commercial vehicles with axle loads in excess of 18,000 pounds. The road also had been subjected to a variety of weather conditions, including freezing and thawing, wetting and drying and all the seasonal changes of a nine-year period.

The pavement was pronounced in excellent condition at the beginning of the test in June of 1950.

## DIFFERENT WEIGHTS CHECKED

The test road was divided into four sections for the experiment with different weight trucks traveling the various sections.

Section No. 1, for example, was pounded by two-axle trucks with rear-axle loads of 18,000 pounds—the weight limit recommended for the nation's road by the American Association of State Highway Officials.

Section No. 2 carried two-axle trucks, too, but these were allowed to haul 22,400 pounds on the rear axle.

The other two sections tested the effect of tandem-axle loads. Section No. 3 carried tandem-axle vehicles with loads of 32,000 pounds. Section No. 4 had tandems hauling 44,800 pounds.

As the trucks started rolling, engineers checked every concrete slab in the road every day to determine what was happening. As cracks developed they were painted with various colored paints to record their progress.

The trucks were scheduled to roll from June to December, taking the test into the winter season and affording an opportunity to incorporate the effect of changing weather into the conclusions as well as the effect of the weight on the road.

## PREMATURE BREAK-UP

But the section carrying the heaviest loads (44,800-pound tandem axles, which, incidentally, is the most prevalent type of over-the-road truck on our highways today) couldn't stand the strain. The Advisory Committee, for safety reasons, ordered traffic halted on this section

after five months because the broken up pavement was too rough for safe operation.

Up to this time, there had been 92,166 truck passes over the pavement carrying the 44,800-pound tandem axles and 3,303 feet of new cracks had been noted. This was 11 times more cracks than recorded on the lane carrying the 32,000-pound tandem.

Meanwhile, the comparatively lighter trucks kept rolling on the other sections. And after six months and 238,000 truck passes, the strip carrying 18,000-pound single axles had developed 241 feet of new cracks. The section carrying 22,400-pound loads on the single axle had 1,210 feet of new breakes, or five times the amount of cracks.

Page 3

This convinced the engineers that weight—and not weather—was the most important factor in road damage today. This brought immediate charges of "unfair" from various selfish interests who claimed, among other things, that trucks on the test road were not carrying normal loads and that the tests were accelerated far beyond normal usage of our highways.

This, of course, is not true in my home state of Ohio, and it seems safe to assume that many of our other states are carrying the same kind of heavy traffic as Ohio roads these days.

## NORMAL TRAFFIC COMPARISON

To get an idea on how the test compares with ordinary, every day traffic let's compare the pounding the test road took with what our main highways have to bear.

On the test road, the trucks made from 884 to 1,333 trips every 24 hours.

A check of several main truck highways in Ohio showed the Ohio pavements were taking a much more severe beating. On U. S. Route 24 between Toledo and the Michigan State Line, for example, 2,840 such commercial vehicles traveled the road in a 24-hour period. On Route 20 south of Toledo, there were 2,240 trucks; on U. S. Route 25 between Dayton and Franklin there were 1,730, and on State Route 14 between Columbiana County and the Pennsylvania boundary, there were 1,520.

These same selfish interests also claimed that soil under the Maryland Test Road was inferior and that the conclusions, therefore, were worthless. This, too, is untrue.

The supervising engineers made careful tests of the soil. They bored holes some 30 inches deep into the ground adjacent to the pavement at 100-foot intervals.

## "PUMPING" PRIME PROBLEM

They found the soils adjacent to the test road were better than the average soils for the whole state of Maryland, and as good if not

tter than the average type soils found under "pumping" pavements
such states as Illinois, Indiana, North Carolina and Tennessee.

"Pumping", incidentally, is one of the main reasons why the heavy vehicles pound our concrete highways to pieces. It occurs at the joints and cracks as the heavy loads pass over the pavement. What happens is that water gathers under the pavement at the joints and cracks. As a heavy load compresses the pavement, the water squirts out, carrying with it quantities of the underlying soil or subgrade.

This carves out huge holes beneath the concrete which tends to break or snap off as heavy loads pass over it.

The Maryland test established that there is a definite correlation between the soil type and the pavement behavior—the higher the granular content of the soil and the lower the plasticity the better the performance.

The test also established that the progress of cracking and depression of joints has a definite relationship to the amounts of pumping.



BEST UNDER 18,000-LBS.

The pavement stood up best, of course, under the 18,000-pound axle load, and this, as previously stated, coincides with the weight limit recommended by the American Association of State Highway Officials.

It also emphasizes the inescapable fact that our roads simply can not stand the pounding of another all-out war effort, and certainly can not be considered expendable as they were in World War II.

In Ohio, for example, a post-war survey showed at least $2 billion was needed to put the roads in shape to carry the traffic of today and the anticipated future. That's more money than was spent for all street and road work in the state in 20 years prior to 1948.

A number of our roads today were built before 18,000-pound axle loads even were heard of, and wouldn't stand up long under such pounding.

It is possible for highway engineers to design pavements which will withstand any given axle loads, but such pavement costs considerably more than that built for moderately heavy loads.

That raises the question of who should pay for these roads of the future, and the answer would seem to be the trucking industry, which is necessitating the building of stronger highways. But the trucking industry, vigorously contending it already is paying its share of highway costs, is fighting all attempts to add to the industry's highway tax bill.

Until this dilemma is resolved by the legislators, it would seem only reasonable to suggest that no heavier loads should be permitted on our highways—a suggestion which was endorsed both at the formation of the Inter-Regional Council on Highway Transportation in Columbus in December of 1949 and at the Governors' Conference at White Sulphur Springs, W. Va., in 1950.

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PENNSYLVANIA STATE GRANGE
OFFICE OF THE MASTER

633 School St.
Indiana, Pa.

Statement regarding the Pennsylvania Motor Truck Association Pamphlet

Please read in your next Grange Meeting.

On August 15th, the Pennsylvania Motor Truck Association published a scurrilous and malicious pamphlet, defaming the character of Pennsylvania Grange officials. They asserted we were duped and misled when we opposed legislation to permit heavier trucks on Pennsylvania's highways.

If the truckers' charges were directed only at the character and integrity of the Grange officials and the implied inability of our 80,000 members to do their own thinking, we would be proud to stand upon our record. That, however, is not the issue. At stake are the highways of our state, the interests of the farmers and above all the interests of all citizens of Pennsylvania. Therefore, we cannot permit their deliberate distortion of facts to go unchallenged.

The accusation that the Grange opposition at the hearings held by Governor Fine, just preceding his veto, was inspired by the railroads and their public relations agent is a deliberate falsehood. Long before the legislature convened, the Grange was publicly on record as opposed to an increase in maximum truck weights. Early in 1950, Granges in Mercer, Potter, and Tioga Counties passed resolutions and sent them to the State Grange. As a result, the following resolution was passed by the Pennsylvania State Grange at York on October 26, 1950, and appears in the Journal of Proceedings, page 112:

> "WHEREAS, The legislatures of the several states have rightly enacted laws limiting weights of loads that may legally be transported on our highways, and,
>
> "WHEREAS, Overloading has become a common practice with certain types of for-hire carriers who are more interested in profits than in obeying the law, and
>
> "WHEREAS, These violations on the part of a minority of carriers are bringing the motor transport industry into disrepute, and
>
> "WHEREAS, Thomas H. MacDonald, Commissioner of the United States Public Roads Administration, has said: "Specifically, we are overloading our highways in their traffic volume capacity and their structural capacity . . . and the results are so costly both to individuals and to the public that they total a disgraceful and extravagant waste in the Nations' true economy,' therefore be it
>
> "RESOLVED, That the Pennsylvania State Grange go on record as being in favor of holding fast to the present weight limit of 73,000 pounds for trucks and trailers, and that the law be strictly enforced."

In compliance with this action, the officials of the Pennsylvania State Grange not only opposed the Big Truck Bill, but introduced a Weight-Distance Highway Use Tax measure patterned after those of Oregon

EX

show that in opposing the Big Truck Bill and urging the Governor to veto the measure, your officials were not working for the best interest of the farmer, but had been used by the railroads to prevent a lowering of hauling rates on fertilizer deliveries to farmers. The truckers based this contention on the case of one, Paul G. Miller, a truckman of Shippensburg, Pennsylvania who was denied the privilege of hauling fertilizer at lower rates than those set by the Interstate Commerce Commission. It is claimed that the railroads, and indirectly the Grange, were responsible for this decision. The facts in this case are a matter of public record, and are on file with the Interstate Commerce Commission at Washington.

On March 24, 1952, a trucking organization, The Middle Atlantic Conference, filed a protest with the Interstate Commerce Commission opposing Mr. Miller's request. Please note that the Conference is "a non-profit corporation, serving over 1,300 motor common carriers, as a freight rate and tariff agency". By far the majority of the common carrier trucking companies that belong to the Pennsylvania Motor Truck Association also are members of the Middle Atlantic Conference. The pamphlet just published by the Pennsylvania Motor Truck Association does not mention this fact.

On the same date, March 24th, the Motor Carrier Bureau of the eastern railroads, of which the Pennsylvania Railroad is a member, also filed a protest with the Interstate Commerce Commission, concurring with the position taken by the Middle Atlantic Conference. It should be pointed out that under the Interstate Commerce Commission regulations, any organization or citizen affected by a proposed change in tariff rates may file a protest. The Grange had no part in this hearing.

Perhaps the greatest distortion of the facts in The Pennsylvania Motor Truck Association pamphlet is their implication that Governor Fine's refusal to sign the Big Truck Bill was responsible for Paul Miller's inability to haul 20,000 pounds payloads of fertilizer to farmers in Dauphin and Cumberland Counties. The inference is that if the Governor had signed the bill, Mr. Miller could haul 20,000 pound loads. The fact that the Big Truck Bill had nothing whatever to do with the situation can be seen from the following section taken from the letter sent by Mr. Miller to the Interstate Commerce Commission under date of March 31, 1952:

> "Most of the fertilizer which I haul is delivered to farms and must be transported over county roads and rural bridges, the majority of which permit only a stated maximum weight. The legal maximum weight on bridges in Cumberland and Dauphin Counties over which I must drive does not permit me to load 20,000 pounds. I find this posting of maximum weights on roads and bridges to be more of a problem everyday, and therefore, if I am to operate without violating the law, it is imperative that I load only 16,000 pounds of fertilizer for delivery to farms."

By inference, the PMTA attempts to convey the impression that by

EXHIBIT D-63

Suggested Letter From Dr. Dimit to Senators, Congressmen, Legislators; with other copies to selected press and grange leaders)

Dear Sir:

Last week the Pennsylvania Motor Truck Association published and leased a scurrilous and malicious pamphlet defaming the character f Pennsylvania Grange officials and asserting we were "duped" and deceived" when we opposed legislation to permit heavier trucks on ennsylvania's highways.

If the issue at hand were concerned solely with the character and ntegrity of Grange officials, we would be proud to stand upon our ecord. That, however, is not the issue . . . . at stake are the highways f our state; the interests of the farmers and above all, the interests f all citizens of Pennsylvania. Therefore, we cannot permit such a eliberate distortion of the facts to stand unchallenged.

The whole point of the pamphlet is the truckers' claim that one Paul . Miller, a truckman, was prevented by the Pennsylvania Railroad nd indirectly by the Grange from lowering rates for hauling fertilizer. he facts are a matter of public record and are on file with the Interate Commerce Commission in Washington.

On March 24, 1952, a trucking organization, the Middle Atlantic onference, filed a protest with the I.C.C. opposing Mr. Miller's reest. Please note that the Conference is "a non-profit corporation rving over 1,300 motor common carriers as a freight rate and tariff gency." By far the majority of the common carrier trucking comanies that belong to the P.M.T.A. also are members of the Middle tlantic Conference.

On March 24, 1952, the Motor Carrier Bureau of the Eastern Railads also filed a protest with the I.C.C. concurring with the position ken by the Middle Atlantic Conference. The Pennsylvania Railroad a member of the Bureau. I should point out that under I.C.C.

regulations any organization or citizen affected by a proposed chang in tariff rates may file a protest.

Perhaps the greatest distortion of the facts in the P.M.T.A. pamphle is the indication that Governor Fine's refusal to sign the Big Truc Bill was responsible for Paul Miller's inability to haul 20,000-poun pay loads of fertilizer to farmers in Dauphin and Cumberland Countie The implication is that if the Governor did sign the bill, Mr. Mille could haul 20,000-pound loads.

The fact is that the Big Truck Bill had nothing whatever to do wi the situation. I quote below from Mr. Miller's letter to the I.C.C dated March 31, 1952.

"Most of the fertilizer which I haul is delivered to farms and mu be transported over county roads and rural bridges, the majori of which permit only a stated maximum weight. The legal max mum weight on bridges in Cumberland and Dauphin Counties ov which I must drive does not permit me to load 20,000 pounds. find this posting of maximum weights on roads and bridges to more of a problem every day, and, therefore, if I am to opera without violating the law it is imperative that I load only 16,0 pounds of fertilizer for delivery to farms. I do not have th problem on the occasional deliveries which are made to warehous and would like to maintain the 20,000 pound truckload minimu weight on this traffic."

In short, the P.M.T.A. attempts to say that by the mere act of signi a bill to increase truck weights our Governor simultaneously wo increase the strength of bridges to enable them to carry substantia heavier loads.

One year before the trucking interests in our State introduced the b to increase truck weights the Pennsylvania State Grange was on r ord opposing any increase in weight limits. The following resoluti was adopted by the Pennsylvania State Grange at York, Pennsylvan October 26, 1950:

"Whereas, The legislatures of the several states have rightly

acted laws limiting weights of loads that may legally be transported on our highways, and,

"Whereas, Overloading has become a common practice with certain types of for-hire carriers who are more interested in profits than in obeying the law, and

"Whereas, These violations on the part of a minority of carriers are bringing the motor transport industry into disrepute, and

"Whereas, Thomas H. MacDonald, Commissioner of the United States Public Roads Administration, has said: 'Specifically, we are overloading our highways in their traffic volume capacity and their structural capacity . . . and the results are so costly both to individuals and to the public that they total a disgraceful and extravagant waste in the Nation's true economy,' therefore be it

"Resolved, That the Pennsylvania State Grange go on record as being in favor of holding fast to the present weight limit of 45,000 pounds for trucks and trailers, and that the law be strictly enforced."

The implication of the P.M.T.A. that Grange officials were "duped" opposing the truck bill of 1951 overlooks the fact that Grange mbers and officers were aware of the real threat to our highways in advance of the date that supposedly we were "influenced."

is the expressed desire of Grange members to continue to oppose attempt to further damage the highways of our State. We have led fight against attempts to increase truck weights and it is the h of our members that we continue in this capacity.

Sincerely yours,

OFFICE COPY

VOLUME IV

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1960

## No. 50

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

*vs.*

NOERR MOTOR FREIGHT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1960
CERTIORARI GRANTED APRIL 18, 1960

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1960**

## No. 50

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

*vs.*

NOERR MOTOR FREIGHT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., AUGUST 2, 1960

"RESOLVED, That the Pennsylvania State Grange go on record as being in favor of holding fast to the present weight limit of [illegible],000 pounds for trucks and trailers, and that the law be strictly enforced."

In compliance with this action, the officials of the Pennsylvania State Grange not only opposed the Big Truck Bill, but introduced a Weight-Distance Highway Use Tax measure, patterned after those of Oregon and New York. The results of the Maryland Highway Test, the studies of the Highway Department of Ohio on the destruction of roads due to the increased weights and overloading, were studied. These facts, together with statistics secured from our own Pennsylvania Division of Motor Vehicles were presented in editorials, personally written by your editor, and published in the Pennsylvania Grange News for March, May and June, 1951. Secretary Mahood also published a front page article in the June 1951 issue. Reprints of these editorials were supplied to every Senator and Representative as well as to the Governor, while the bill was still under consideration by the Legislature. In this opposition, we were joined by the state organizations of Township Road Supervisors, The Motor Clubs of Pennsylvania, Federation of Women's Clubs, and numerous other civic organizations, and the railroads. The facts presented by the Grange and these organizations, particularly the data revealed by the Maryland Test, finally led Governor Fine to veto the bill. Were all those opposed, "duped"?

EXHIBIT D-62

"Most of the fertilizer which I haul is delivered to farms and must be transported over county roads and rural bridges, the majority of which permit only a stated maximum weight. The legal maximum weight on bridges in Cumberland and Dauphin Counties over which I must drive does not permit me to load 20,000 pounds. I find this posting of maximum weights on roads and bridges to be more of a problem everyday, and therefore, if I am to operate without violating the law, it is imperative that I load only 16,000 pounds of fertilizer for delivery to farms."

By inference, the PMTA attempts to convey the impression that by the mere act of signing a bill to increase truck weights, our Governor simultaneously would increase the strength of bridges so as to enable them to carry substantially heavier loads. This inference is on a par with their contention that the Grange officials were "duped" into opposing the Big Truck Bill. They purposely overlook the fact that the Grange members and officers were aware of the destruction being wrought upon our highways by the huge overloaded trucks long in advance of the date that supposedly we were influenced or duped.

In accord with the expressed desire of the Grange members, we shall continue our opposition to further damage of our roads by increased truck loads. We shall work for stricter enforcement and heavier fines, graded to the extent of the overloading, and we shall urge the enactment of a more equitable and fair type of tax with which to construct and maintain the heavier type of roads demanded by present day traffic.

You can assist by letting your Representatives and Senators elect know your stand on this issue before election day, November 4th. A resolution, stating the stand of your Grange should be published in your local paper. A similar resolution, forwarded to the State Grange Session at Allentown, will strengthen the hands of your elected Grange officers and legislative committee.

Fraternally yours,

/s/ Beatty H. Dimit
Beatty H. Dimit, Master
The Pennsylvania State Grange

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[fol. A]

# IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,750

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NOERR MOTOR FREIGHT, INC., et al., Appellants,

—v.—

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.

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APPEAL FROM THE DECREE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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**Appellants' Appendix—Filed November 26, 1958**

[File endorsement omitted]

[fol. 1]

# IN UNITED STATES DISTRICT COURT
## FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

| | |
|---|---|
| 1/17/53 | Complaint filed. |
| 3/30/53 | Answer of Pennsylvania Railroad Co., filed. |
| 1/28/54 | Order of Court granting motion of D. F. Bast, et al., to intervene as parties plaintiff, filed. |
| 10/ 8/57 | Plaintiffs' requests for findings of fact and conclusions of law holding defendants liable for violating the antitrust laws (filed with Judge Clary 3-14-57), filed. |
| 10/10/57 | Opinion Sur Pleadings & Proof, with findings of fact and conclusions of law, granting injunctive relief and awarding certain damages, etc., filed. |
| 7/22/58 | Final decree. |
| 8/18/58 | Notice of appeal by plaintiffs, filed. |
| 8/27/58 | Order of Court extending time for docketing the appeal filed by defendants on 7/31/58 and the appeal filed by plaintiffs on 8/18/58 to 10/27/58 filed. |

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[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed January 17, 1953

1. The plaintiffs, other than the plaintiff Pennsylvania Motor Truck Association, said plaintiffs being hereinafter called "Truck Operators", are each engaged in the trucking business in Pennsylvania or operate regularly through Pennsylvania, each one operating trucks in inter-city and interstate long distance hauling. Most of the plaintiffs are

members of the plaintiff Pennsylvania Motor Truck Association, which is hereinafter described, and all of the plaintiffs bring this action on behalf of themselves and all others similarly situated, of which the class is too numerous to appear before the court in its entirety. The plaintiffs constitute a substantial and adequate representation of said class.

2. The plaintiff Pennsylvania Motor Truck Association is a corporation chartered under the Act of April 29, 1874, and its supplements, on April 24, 1928, by Judge T. D. Finletter of the Court of Common Pleas No. 4 of Philadelphia County, having its principal office at the 7th Floor, Telegraph Building, Harrisburg, Pennsylvania. This Association, hereinafter called the PMTA, which has chapters in every county of the Commonwealth of Pennsylvania, consists primarily of operators of motor trucks who operate in or through Pennsylvania, including industries operating their own trucks as well as those operating trucks for hire.

3. The defendant, Eastern Railroad Presidents Conference, hereinafter called "Conference", is an unincorporated association, having offices at 230 Park Avenue, New York 17, New York, and 143 Liberty Street, New York, New York. The membership of the Conference includes, as its backbone, the presidents or trustees of approximately 35 railroads in 17 eastern states of the United States, operating north of the Potomac and east of the Ohio rivers. The presidents and trustees officially represent their respective [fol. 3] railroads in the Conference, which is supported, maintained and utilized by said railroads.

4. The Conference maintains a permanent functioning organization and a staff of paid personnel; it has regular meetings of its members, and has recently appointed David I. Mackie as permanent chairman at a salary of about $45,000 a year. The Conference operates through a number of Committees and sub-Committees, including a Committee on public relations, and also maintains a Bureau of Information at Room 5710 Grand Central Terminal, New York 17, New York.

5. The respective Railroads are regularly assessed for the cost of operating the Conference, assessments being

made on a trackage basis, so that the Conference is largely supported by the Big Railroads, such as the Pennsylvania Railroad Company, the New York Central, the Reading Railroad Co., the Baltimore and Ohio, and the Chesapeake and Ohio, which in turn dominate the Conference.

6. The aforesaid Committee on Public Relations of the Conference maintains an office at 143 Liberty Street, New York 6, New York, and currently its members are: defendant William White, Chairman of the Committee and President of the New York Central system; defendant John J. Fitzgerald, Vice-Chairman of the Committee; defendant Walter S. Franklin, President of the Pennsylvania Railroad Company; defendant W. J. Tuohy, President of the Chesapeake and Ohio Railway Co.; defendant R. B. White, President of the Baltimore and Ohio Railroad Co.; defendant P. W. Johnston, President of the Erie R. R. Co.; defendant P. M. Shoemaker, President of the D. L. and W. R. R. Co.; defendant C. M. Hutchins, President of the Bangor and Aroostook R. R. Co.; and defendant L. L. White, President of the New York, Chicago and St. Louis R. R. Co. The public relations department of the Confer- [fol. 4] ence has at all times material hereto been run by the aforesaid defendant, John J. Fitzgerald, subject to the direction of the Conference and the aforesaid Committee. In its participation in the illegal conspiracy hereinafter to be alleged, this Committee, together with its members, regularly held meetings in the Reading Terminal, Philadelphia, Pa., during a period when R. W. Brown of the Reading Railroad was its Chairman.

7. On or about May 24, 1949, in furtherance of the conspiracy hereinafter to be alleged, the Conference also appointed a Special Committee on Competitive Transportation, hereinafter called the Competitive Transportation Committee, to be assisted by sub-Committees of Counsel, Research and Public Relations. The members appointed to the Competitive Transportation Committee were the following: defendant M. W. Clement, then President of the Pennsylvania R. R. Co.; defendant G. Metzman, then President of the New York Central; defendant R. B. White, President of the Baltimore and Ohio R. R. Co.; defendant

William White, President of the Delaware, Lackawanna and Western R. R. Co.; defendant L. F. Whittemore, President of the New York, New Haven and Hartford R. R. Co.; and defendant W. J. Tuohy, President of the Chesapeake and Ohio R. R. Co. Said W. J. Tuohy was selected as Chairman of the Committee.

8. The individual defendants, except as herein otherwise alleged, are respectively present or past presidents or trustees of the defendant railroads, and are members of the defendant Conference. The defendants T J. Ross, Thomas Deegan and John J. Fitzgerald were at all times material hereto key members of the Public Relations Committee of the Conference.

9. The defendant railroads, hereinafter called the Railroads, include the giants in the passenger and freight trans- [fol. 5] portation industry in the northeastern area of the United States, accounting for 80% of the freight transportation in that area. All of them regularly transact business or maintain regular offices for the conduct of their business in Pennsylvania.

10. The defendant Carl Byoir and Associates, Inc., hereinafter called Byoir, is a New York corporation, engaged in business as a publicity agent, with its principal office at 10 East 40th Street, New York. Byoir regularly transacts business in Pennsylvania.

11. This case arises under the anti-trust laws of the United States, and more particularly under Sections 1 and 2 of the Act of July 2, 1890 (26 Stat. 209, 15 U. S. C. A. Secs. 1; 2), commonly known as the Sherman Act. Jurisdiction thereof is conferred upon this Court by Section 7 of said Act, and by Sections 4, 12 and 16 of the Act of October 15, 1914, as amended (38 Stat. 731, 736, 737, 15 U. S. C. A. Secs. 15, 22 and 26), commonly known as the Clayton Act.

12. The defendant railroads have, over a period of years, culminating in the acts herein averred, sought by divers means to obstruct, hamper and impede interstate transportation by motor vehicle, in which plaintiffs and

others are engaged as a development in the art of transportation providing improved efficiencies and more economical and flexible means of carriage of freight and passengers, the purpose and objective of the concerted action of defendants being to maintain a monopoly of transportation, by means of their own facilities, by destroying interstate competitive highway transportation, through fomenting governmental restrictions and undermining public confidence in this newer form of transportation—all to the detriment and irreparable harm and damage to the plaintiffs, the users of their facilities, and the economy of Pennsylvania.

[fol. 6] 13. In or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the anti-trust laws of the United States, aimed at destroying the plaintiffs and those similarly situated, as competitors in the field of the hauling of freight, and at carrying out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the Railroads would have a monopoly on freight hauling in interstate commerce.

14. The agency through which the Railroads worked for effectuating the aforesaid monopolistic conspiracy was the defendant Conference, consisting of the Presidents of all of the interested Railroads, its various committees, subcommittees, and their members, as hereinbefore described, which pursuant to and in furtherance of the aforesaid conspiracy, performed or procured the performance of all of the acts hereinafter alleged.

15. In or about May, 1949, the defendant Conference, having appointed its Committee on Competitive Transportation as an instrumentality for the carrying out of the conspiracy, retained the defendant Byoir as publicity agent for the express purpose of carrying the conspiracy into effect, and at all times material hereto, the defendant Conference, its committee on public relations and the individual members thereof, its committee on competitive transportation and the individual members thereof, the defendant railroads, the defendant presidents and trustees, and other individual defendants, and the defendant Byoir, together

with divers other persons to the plaintiffs unknown, have acted in combination and concert to achieve the goal of the conspiracy.

16. The defendant Byoir was given carte blanche by the defendant Conference and its members, on behalf of the defendant railroads, to carry out their illegal conspiracy to [fol. 7] monopolize freight transportation, and defendant Byoir immediately instigated a vicious, corrupt, and fraudulent campaign against the plaintiffs and others similarly situated, with the complete knowledge, consent and approval of each and every other of the other defendants, designed to impede their operations in every way possible, and ultimately to deprive them of any freight business. The means of this campaign, which will hereinafter be alleged in more detail, include the following:

(a) Bribery of public officials;

(b) Bribery of the officials of independent organizations;

(c) Formation of "independent" citizens organizations to circulate false and malicious propaganda composed and prepared by Byoir for the railroads, attacking the plaintiffs, without disclosing the participation of the railroads;

(d) Use of existing "independent" citizens organizations for the same ends;

(e) Vilification and defamation of the plaintiffs by the circulation to the public generally, to public officials, and to suppliers and customers of the plaintiffs, of false and malicious reports of and concerning the plaintiffs in their business of hauling freight.

(f) Unfair competition with the plaintiffs by all of the above means.

Whenever the dissemination of false and malicious reports or propaganda is referred to in this Complaint, it includes such statements as the following: that the plaintiffs are unreliable, untrustworthy and inefficient in the conduct of their business as haulers of freight; that the plaintiffs have a reckless disregard for the laws of the

states through which they travel, creating an extreme hazard to all other users of the highways; that the plain-
[fol. 8] tiffs are deliberately ruining the highways and rural roads of said states; that the plaintiffs are delinquent in paying their share of the cost of upkeep of the highways; that the plaintiffs are dishonest in their business methods, being "Five per centers", who use bribery and corruption of public officials to gain their ends; that plaintiffs are not fit to serve the industry of the Country in the long-distance hauling of freight, and so forth.

17. As part of this campaign, aimed at monopolizing the freight business for the benefit of the defendant railroads, and at driving the plaintiffs and others similarly situated out of the transportation industry, pursuant to the conspiracy of, and in conspiracy with and with the knowledge and approval of the other defendants, the defendants acting through the defendant Byoir did the following, in the states of New York, New Jersey, Pennsylvania, and elsewhere, intending to inflame public opinion against and do injury to the plaintiffs, without disclosing that it was being done on behalf of and at the direction of the Railroads.

(a) Organized "citizens" groups, like the Empire State Transport League, of 11 North Pearl Street, Albany, New York, the New Jersey Citizens Tax Study Foundation, of 9 West Park Street, Newark, New Jersey, which had a key Byoir employee as its secretary and one of its trustees, and other such associations, all of which purported to be independent citizens organizations expressing independent views, but which in actual fact were formed and availed of solely for the fraudulent purpose of disseminating false and malicious propaganda against the plaintiffs and for the fraudulent purpose of creating the false impression publicly that there was bona fide independent protest against the trucking industry.

(b) Availed itself of existing citizens groups, such as the New Jersey Automobile Owners, Inc. of 155 Evergreen Place, East Orange, New Jersey, and the Citizens Tax League, of 16 State Street, Rochester, New York, as in-
[fol. 9] struments for the fraudulent purpose of disseminat-

ing the same false and malicious railroad propaganda against the plaintiffs and for the fraudulent purpose of giving the public and public officials the false impression that *there were bona fide independent protests against the trucking* industry.

(c) Obtained access to such influential groups as the Pennsylvania State Grange and the Pennsylvania Association of Township Supervisors, which also became instruments for the dissemination of the aforesaid railroad attacks on the plaintiffs, through corruption of certain of their officials.

18. For all of these groups, and others like them, the Byoir organization prepared, composed and planned in its offices in New York and elsewhere, propaganda releases, which were published as though they emanated from the respective groups. Byoir took special pains to assure that material supposed to originate in New Jersey and Pennsylvania should be mailed from those states, thereby engaging in a systematic scheme to defraud the public through the use of the United States mails. One such release, composed by Byoir, was issued over the name of Artemas Leslie, Insurance Commissioner of Pennsylvania.

19. Byoir agents, throughout the Commonwealth of Pennsylvania, as well as in New York and New Jersey, also approached motor groups and automobile clubs, real estate boards, economy groups, service groups, safety groups, municipal officials, rural road improvement groups, and others, to agitate them with their intentionally false propaganda against the plaintiffs, concealing the fact that they were doing so on behalf of the Railroads.

20. In 1951 the activities of the defendants, in pursuance of their conspiracy, reached a climax in Pennsylvania, where what was known as the "Fair Truck Bill", officially Senate Bill 615, came before the General Assembly. The object of this bill was to put the plaintiffs and other [fol. 10] Pennsylvania truck operators on an equal footing with truck operators in the surrounding states of New York, Ohio, New Jersey, Delaware and Maryland, by raising the legal weight limit for tractors and tandem-axle semi-trailers.

All of these states permit truck weight limits of 60,000 lbs. or more, whereas Pennsylvania has a limitation of 45,000 lbs.

21. Acting under the Railroad conspiracy herein alleged, the full force of the Byoir organization was immediately used against the Bill. When these efforts failed, and the Bill passed both House and Senate, the Byoir agency then instigated a campaign to bring about the vetoing of the Bill by Governor Fine. To that end, Byoir mobilized the protest of and composed releases for numerous organizations, including the Pennsylvania State Grange, the Pennsylvania Association of Township Supervisors, and others, attacking the Bill and attacking the plaintiffs and others in their situation. The Governor, naturally assumed that this was a bona fide and independent grass-roots protest, whereas in actual fact it was all plotted, created, and master-minded in the Byoir office at the behest of the Railroads. To some of the "independent" protest groups, Byoir gained access by Bribery of their officials, who sacrificed the interests of their members to serve Byoir's ends.

22. An important consideration in Governor Fine's vetoing of S. 615 was the Maryland Road Test No. 1, an experimental test of the effect of truck traffic on highways, being conducted under the sponsorship of eleven states, including Pennsylvania. The Byoir organization, as an alternative to defeating passage of S. 615, set out to delay its passage until the aforesaid Maryland test should be completed, because Clinton M. Johnson, public relations agent of the State Highway Commission of the State of Maryland, was receiving payments from Byoir, in return for which he had agreed to and did in fact publish a misrepresented and distorted account of the test to the dis-
[fol. 11] advantage of the truck operators before the official analysis of the results was made on April 1, 1952.

23. On the basis of the railroad-organized protests, which he assumed to be independent of the Railroads, and the aforesaid misrepresentation of the Maryland Road Test, which was widely publicized by Byoir, Governor Fine vetoed the Bill on January 21, 1952.

24. In furtherance of the campaign, Byoir, in addition to bribing public officials and officials of organizations, also had members of its staff join so-called independent organizations to direct and control their activities; bought and paid for "independent" newspaper columnists to carry their false message; financed farm radio net-works in order to put pressure on farm groups, all as instruments of the said defendants' false propaganda, as hereinafter described.

25. In furtherance of the campaign, Byoir deliberately smeared those of the plaintiffs who are long-distance truck operators by labelling them as "five per centers", to take advantage of the nefarious connotation of that term simply because the operators of long-distance trucks account for approximately 4.7% of the business done by the trucking industry, which has no connection whatever with the meaning of the term "five per center".

26. In furtherance of the campaign, Byoir approached suppliers and customers of the plaintiffs, and disparaged the plaintiffs to them, as they had in all of their public propaganda hereinabove alleged, by falsely and maliciously stating to them that the plaintiffs were engaged in a business which was wrecking the highways and rural roads of Pennsylvania and other states through which they travelled; that the plaintiffs constituted an extreme hazard on the highways; that the plaintiffs did not pay their fair share of the cost of maintaining the highways, and so forth.

27. The conspiracy of all of the defendants against the plaintiffs is continuing unabated to this day, with a par- [fol. 12] ticular view to the 1953 session of the Pennsylvania General Assembly, which has just opened, and where the Railroads hope to achieve the same result that they did with the Governor's veto in 1952 by the same illegal and clandestine methods.

28. All of the acts herein set forth performed pursuant to the conspiracy of the defendants, have resulted in disparaging the plaintiffs' business in the public mind, in creating great public hostility to the plaintiffs, in impeding plaintiffs in the legitimate conduct of their business and

legitimate furtherance of their business ends, in preventing the passage of legislation beneficial to the plaintiffs, and in financially damaging the plaintiffs, both by increased expense of operation, loss of accounts, and loss of profits and prospective profits.

29. All of the acts herein set forth performed pursuant to the conspiracy of the defendants, in addition to damaging the business and interests of the plaintiffs, have greatly injured the public interest and will in the future tend increasingly to do so by monopolizing the hauling of freight in interstate commerce, resulting in increasing the cost to shippers and consumers of all commodities necessary to life, including clothing and food, a high percentage of which reaches consumers only by carriage in motor trucks. A fundamental aim of the conspiracy of the defendants has been to maintain high freight rates in interstate commerce, and to prevent any reduction therein which would naturally result from the normal process of competition.

30. The plaintiffs have suffered damages and will in the future suffer loss, damage and injury as hereinabove specified by reason of the facts complained of herein, the illegal acts and unlawful conspiracy of the defendants. The damages to each respective plaintiff cannot at present be measured with exactness and precision, because of the nature of the injuries done to them, for which the defen [fol. 13] dants are solely responsible. The damages to the class represented by the plaintiffs are, when trebled under the anti-trust laws, in excess of $250,000,000.

31. Each plaintiff is suffering and will continue to suffer irreparable harm and injury unless the defendants are enjoined from the practices complained of herein or any other practices pursuant to their conspiracy.

Wherefore, plaintiffs demand:

1. That each and every one of the defendants, their subsidiaries, affiliates, and successors, and their officers, employees, committees and agents, or any persons acting in concert with them, be enjoined and restrained from doing any of the following, or taking any action furthering or

intended or reasonably calculated to further, the accomplishment of any of the following, pursuant to or in furtherance or continuance of the conspiracy herein alleged:

(a) Preparing, composing or publishing any release relating to the plaintiffs or their business without disclosing that it has been prepared, composed or published by or on behalf of the defendant railroad;

(b) Disseminating any information, disparaging the plaintiffs or their business to any persons or groups without disclosing that the information is being disseminated on behalf of the defendant railroads;

(c) Employing the defendant Byoir or anyone else to conduct an undercover campaign against the plaintiffs and their business;

(d) Organizing or using any non-railroad associations as instruments for circulating disparaging information about the plaintiffs or their business.

(e) Making payments, whether by way of salary, expenses, bribes, or of any other nature, to any officials of any public or private organizations to induce them to adopt [fol. 14] and propagate the position of the railroads against the plaintiffs or their business.

(f) Exerting or attempting to exert any pressure on the legislature or Governor of the Commonwealth of Pennsylvania through the medium of front organizations, against the plaintiffs or their business.

(g) Employing any of the devices or techniques described in the complaint for the purpose of injuring the plaintiffs in their business as haulers of long-distance freight.

(h) Doing any other act or thing to further the combination and conspiracy herein alleged or to accomplish the objects and purposes thereof.

(i) Combining or conspiring among themselves or with any other person to restrain, restrict, limit or prevent the growth, development, or expansion of the plaintiffs as com-

petitors in interstate commerce with them or any of them, or so combining or conspiring otherwise to restrain, restrict, limit or prevent, the plaintiffs' competition in interstate commerce with them or any of them.

2. That pending the trial of this cause, this Honorable Court grant a preliminary injunction in the respects above prayed for, and such other temporary, preliminary or interim relief as the necessities of the case may from time to time require.

3. That each and every one of the defendants be required to pay to each of the plaintiffs damages in an amount to be determined at the trial of this action.

Robert McCay Green, 2635 Fidelity-Phila. Trust Bldg., Philadelphia 9, Pennsylvania, Attorney for Plaintiffs.

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[fol. 15]

IN UNITED STATES DISTRICT COURT

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY TO COMPLAINT—Filed March 30, 1953

Defendant, The Pennsylvania Railroad Company, in answer to the Complaint filed in the above case, avers:

First Defense.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the Complaint.

2. This defendant admits that The Pennsylvania Motor Truck Association was chartered as averred in paragraph 2 of the Complaint, but it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 2 of the Complaint.

3. This defendant admits that the Eastern Railroad Presidents Conference is unincorporated, that it has offices at 143 Liberty Street, New York, N. Y., that its membership includes the presidents of approximately 35 railroads

in the Eastern part of the United States, and that its expenses are paid by said railroads, but denies the remaining averments of paragraph 3 of the Complaint.

4. This defendant denies that the Conference operates through a number of committees and subcommittees, including a committee on public relations, but admits the remaining averments of paragraph 4 of the Complaint.

5. This defendant admits that the respective railroads are regularly assessed for the cost of operating the Conference, but denies the remaining averments of paragraph 5 of the Complaint.

6. This defendant denies the averments of paragraph 6 of the Complaint.

[fol. 16] 7. This defendant admits that on May 19, 1949 the Conference appointed a committee known as the Competitive Transportation Committee, to be assisted by subcommittees designated Legal, Research and Public Relations; that W. J. Tuohy was Chairman of the Competitive Transportation Committee and that the persons named in paragraph 7 of the Complaint were, among others, members of that Committee, but denies that the said Committee was appointed either in furtherance of any conspiracy alleged in the Complaint or of any other conspiracy whatsoever.

8. This defendant denies the averments of paragraph 8 of the Complaint.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 of the Complaint.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Byoir regularly transacts business in Pennsylvania, but admits the remaining averments of paragraph 10 of the Complaint.

11. This defendant is advised that the averments of paragraph 11 of the Complaint are conclusions of law which require no answer, but, to the extent that they constitute averments of fact, denies them.

12. 13. 14. 15. 16. 17. 18. 19. This defendant denies the averments of paragraphs 12, 13, 14, 15, 16, 17, 18 and 19 of the Complaint.

20. This defendant admits that the States of New York, Ohio, New Jersey, Delaware and Maryland permit gross truck weight limits greater than those permitted by Pennsylvania, but denies the remaining averments of paragraph 20 of the Complaint.

[fol. 17] 21. This defendant denies the averments of paragraph 21 of the Complaint.

22. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that an important consideration in Governor Fine's vetoing of S. 615 was the Maryland Road Test No. 1. This defendant avers, however, that, although that was only one of the factors mentioned by the Governor in his message setting forth his reasons for his disapproval of the bill, a copy of which is attached hereto marked "Exhibit A", that factor, or any one of said factors, would have justified his so doing. This defendant further avers that the Maryland Road Test conclusively established that the damage to the highways of Pennsylvania caused by the plaintiffs' and others' trucks would have been enormously increased if S. 615 had become law. This defendant denies the remaining averments of paragraph 22 of the Complaint.

23. This defendant admits that Governor Fine vetoed S. 615 on January 21, 1952, but denies the remaining averments of paragraph 23 of the Complaint.

24. 25. 26. The defendant denies the averments of paragraphs 24, 25 and 26 of the Complaint.

27. 28. This defendant denies the existence of any conspiracy, either as averred in paragraphs 27 and 28 of the Complaint or otherwise, and denies the remaining averments of paragraphs 27 and 28 of the Complaint.

29. This defendant denies the existence of any conspiracy, either as averred in paragraph 29 of the Complaint or otherwise, denies that anything done by the defendants

or any of them will monopolize or tend to monopolize the hauling of freight in interstate commerce, and also denies the remaining averments of paragraph 29 of the Complaint.

[fol. 18] 30. This defendant denies that it or any of the defendants is guilty of any illegal act or unlawful conspiracy and also denies the remaining averments of paragraph 30 of the Complaint.

31. This defendant denies the averments of paragraph 31 of the Complaint.

Second Defense.

32. This defendant avers that the plaintiffs are not entitled to bring this action on behalf of themselves and all others similarly situated.

Third Defense.

33. The Complaint fails to state a claim against this defendant upon which relief could be granted.

Fourth Defense.

34. The Complaint purports to set forth a cause of action for libel, slander, disparagement, and unfair competition, as to which the Court lacks jurisdiction since the citizenship of the parties is not diverse.

Fifth Defense.

35. For further answer this defendant avers that the characterization by the plaintiffs of Senate Bill 615 as the "Fair Truck Bill" was a deliberate attempt to deceive both the general public and the members of the Legislature of Pennsylvania, to distract their attention from the inequities and inadequacies of that bill and to create the false impression in their minds that the enactment of Senate Bill No. 615 would not increase the damage done to the roads of Pennsylvania by heavy trucks.

36. This defendant further avers that heavy trucks operated by the plaintiffs and others are causing enormous [fol. 19] damage to the roads of Pennsylvania and of other

states—which damage is vastly in excess of the contributions made by the owners of such trucks to the cost of construction and maintenance of said roads—that said heavy trucks greatly increase the hazard of driving other vehicles on the roads of Pennsylvania and of other states, and that the plaintiffs and other operators of heavy trucks regularly and deliberately violate the weight and speed limitations imposed by the laws of the Commonwealth of Pennsylvania and of other states, thereby further increasing both the hazards on the roads and the physical damage thereto.

37. This defendant further avers that the plaintiffs and other users of large trucks, although operating only about 5% of the nation's freight-carrying motor vehicles and 1% of the total motor vehicles using the public streets and highways, have by untrue and misleading statements, advertising pamphlets, pictures and otherwise, sought to give the impression that they speak for all of the highway users including the operators of 8,700,000 small and medium-size trucks and over 44,000,000 passenger cars, and that by these means they have attempted to keep from the public and the legislatures information of the great and costly damage to the highways that they, a small fraction of the highway users, have caused and are causing.

38. This defendant further avers that it not only does not seek and never has sought to maintain a monopoly of transportation or to destroy transportation by truck, whether competitive or otherwise, but that it has fostered and encouraged, and continues to foster and encourage, honest, lawful, legitimate and fair operation of trucks, whether in competition with this defendant or otherwise, but at rates which fairly represent the cost of the service rendered and not at rates made artificially low by an indirect subsidy which transfers a considerable part of the costs of private transportation to the general public. The [fol. 20] railroads own or operate many thousands of trucks, and this defendant, the largest truck operator in Pennsylvania and the sixth largest truck operator in the nation, alone owns or operates in excess of 5,000 trucks which are used to supplement the movement of freight by railroad,

and therefore has a vital interest in the well-being of the trucking industry and in the maintenance of the nation's highway system.

39. This defendant further avers that to the extent that the plaintiff and others violate the laws of the states in which they operate they compete unfairly and illegally with this defendant. In the Commonwealth of Pennsylvania alone in the year 1952, there were 28,000 arrests of truck operators because of violations of weight limitations by overloading. This defendant has sought and will continue to seek to prevent such unfair competition with it by every legal and proper method available to it.

40. This defendant further avers that the plaintiffs and others operating large vehicles, particularly those carrying axle loads in excess of 18,000 pounds, fail to pay their proportionate share of the damage that such loads cause the highways over which they move, and that to that extent they are unfairly subsidized by the general public and by the other taxpayers whose tax payments, devoted to the construction, repair and maintenance of roads, are proportionately greater than they would be if those whose vehicles carry such excess loads were required to pay their fair share of highway costs.

41. This defendant further avers that as a payer of large amounts of taxes to the federal, state and local governments, it is adversely affected by the plaintiffs' and other big truckers' failure to pay their fair share of the cost of building and maintaining the public highways which they use in their private businesses; and that this defendant had and has a legal as well as a moral right to inform the public and the members of the legislatures of the in- [fol. 21] sufficiency of highway user taxes paid by the plaintiffs and other users of large trucks.

42. This defendant further avers that whatever acts affecting the plaintiffs have been done by defendant, those acts were lawful in themselves and lawfully done in furtherance of this defendant's constitutional rights to inform the public and the legislatures of the several states

of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the laws limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create—facts which the plaintiffs have actively sought to distort and suppress.

43. This defendant further avers that, in bringing to the attention of the members of the legislatures and of the public the illegal operations of the plaintiffs and others using large trucks, and the destruction of the American highway system by such use, and the failure of the users of large trucks to pay their fair share of the costs of building and maintaining the highways; this defendant was joining the protests of a great cross-section of the American public,—private motorists, highway engineers, taxing authorities, state legislators, governors, and farm and business groups.

Sixth Defense.

44. This defendant avers that plaintiffs are precluded from obtaining injunctive relief or damages by their own illegal conduct, as follows:

a. Plaintiffs, acting in concert through the agency of the plaintiff Pennsylvania Motor Truck Association, have over a period of years engaged in the dissemination of untrue and disparaging statements concerning [fol. 22] this defendant, which statements were published and circulated by the plaintiffs with the purpose of injuring this defendant in its business and in its relations with its customers. Such untrue and disparaging statements were circulated by the plaintiffs to the public in general, to public officials and to suppliers and customers of the defendant.

b. This suit was instituted by the plaintiffs with the purpose of injuring this defendant as a competitor in the interstate freight transportation business by the

repetition, under the cloak of the privilege of these proceedings, of untrue statements concerning this defendant and its business.

c. This suit is a further attempt by the plaintiffs and other users of heavy trucks to divert attention from mounting public opinion against the destruction of the highways caused by large tractor-trailer combinations and other heavy trucks, so as to enable the plaintiffs to continue to avoid the payment of proper and sufficient charges for their use of the highways, and thereby retain their ability to compete with this defendant on an unfair and discriminatory basis.

Philip Price, for Barnes, Dechert, Price, Myers & Rhoads, Attorneys for Defendant, The Pennsylvania Railroad Company.

[Similar answers were filed by the other defendants.]

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[fol. 23] EXHIBIT A TO ANSWER

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VETO No. 48.

January 21, 1952.

I file herewith, in the Office of the Secretary of the Commonwealth, with my objections, Senate Bill No. 615, Printer's No. 511, entitled 'An Act to further amend the act approved the first day of May one thousand nine hundred twenty-nine (P. L. 905) entitled 'An act for the protection of the public safety regulating the use of highways and the operation of vehicles tractors street cars trackless trolley omnibuses bicycles pedestrians and the riding of animals upon the highways of this Commonwealth providing for the titling including liens encumbrances and legal claims registration of certain vehicles and licensing the operators thereof upon payment of prescribed fees prescribing and limiting the powers of local authorities to deal with the subject matter of this act conferring powers and imposing duties upon the Depart-

ment of Revenue the Department of Highways peace officers majors burgesses magistrates aldermen justices of the peace the courts and the clerks thereof owners of vehicles and garage keepers providing that records are admissible as evidence imposing upon owners counties cities boroughs incorporated towns townships within the Commonwealth liability for damages caused by the negligent operation of their motor vehicles imposing penalties imposing certain costs upon counties providing for the disposition of fines forfeitures fees and miscellaneous receipts making an appropriation and providing for refunds by increasing annual registration fees for certain commercial motor vehicles truck tractors trailers and semitrailers prescribing additional equipment requirements for certain vehicles increasing the maximum gross weights and [fol. 24] axle loads allowed for certain vehicles changing the requirements for weighing vehicles and removal of excess loads and prescribing and changing penalties PROVIDING THAT CERTAIN PENALTIES SHALL BE ENFORCED BY LIENS UPON VEHICLES AND THE SALE OF SUCH VEHICLES FREE OF ALL LIENS AND ENCUMBRANCES AND IMPOSING DUTIES UPON OPERATORS OWNERS MAGISTRATES AND SHERIFFS."

This bill would amend the Vehicle Code, Act of May 1, 1929, P. L. 905, by, among other things, increasing the permissible gross loads of various classes of commercial vehicles and combinations of motor vehicles and trailers and truck tractors and semitractors as well as the permissible tandem axle loads (1).

Being mindful of the observations of Mr. Chief Justice Gibson, over a century ago, that, in Pennsylvania a highway "is the property of the people, not a particular district, but of the whole State" (Philadelphia and Trenton Railroad Co., 6 Wharton 25, 43 (1840), I was motivated by the strong and determined opposition to this bill to call a public hearing to enable the opponents and propo-

(1) Theoretically tandem axle loads are not increased by this bill. Actually, however, under the presently existing permissible gross, it would be impossible, if the load were properly distributed to obtain a load of 36,000 pounds on a tandem axle of a semitrailer.

nents thereof to present their respective views before making a final decision either to approve or disapprove it.

The hearing was held in the executive office at the State Capitol on Thursday, January 17, 1952. A myriad of views were presented by representatives of various civic, municipal, labor, industrial, and railway organizations and trucking industry of Pennsylvania itself.

I am fully mindful that the trucking industry plays a significant and important role in the economic and community affairs not only of this Commonwealth, but also the entire nation. I am not convinced that it pays its just [fol. 25] share of the maintenance of our public highway system. I am also mindful of the possible destructive effects which, as demonstrated by the tentative findings of the Highway Research Board of the National Academy of Sciences, based on actual tests during the last year and a half on a section of highway built by the State of Maryland in 1941, may result from the increase of permissible gross and axle loads. I should point out, however, that all of the information available to me was *not* available to the Legislature when this bill was being considered by it. Ordinarily, in such a matter as this, I would feel constrained to accept the legislative views, but, after careful and thorough consideration, especially in view of the critical shortage of materiel which are used in highway construction projects, I am convinced that the wisdom of subjecting our highway system—a $1,700,000,000 investment—to additional burdens should be carefully considered by the Legislature in the light of the final findings and recommendations of the Highway Research Board which, unfortunately, will be published too late for me to consider them. If the Legislature, in the light of the final report and recommendations of the Highway Research Board, as well as other matters which I mentioned herein, again adopts the basic policy of this bill, I would hardly have any choice in the matter for the Supreme Court has said that "It is for the Commonwealth acting through the Legislature, to direct the conditions under which * * * (the) right to use the highway) shall be exercised." Commonwealth v. Funk, 323 Pa. 390, 394, 395 (1896).

Deferring the policy of this bill will not, in the meantime, severely handicap the trucking industry of this Commonwealth during the period of time required for further Legislative consideration—a year. The tandem axle weights allowed by this bill, I am informed, will be lawful only in a very few states.

This bill contains some inconsistencies. For instance, I am informed that the permissible gross of classes Y, Z and [fol. 26] ZZ can only be attained by exceeding the permissible axle load which, of course, is not a desirable situation.

(2)

Furthermore, the $25.00 fine provided by this bill for violation of the permissible axle load—in my opinion, a very serious matter—is woefully inadequate as an effective deterrent.

Last, but not least, legislation of this nature should contain specific limitations predicated on all of the factors generally regarded by public highway authorities as related to the preservation of our *entire* highway system, including not only primary but also secondary and rural facilities. In short, it should be made just as unprofitable for a vehicle or combination to violate load restrictions on posted highways and bridge facilities imposed by the Secretary of Highways and local authorities, pursuant to law, as to violate the permissible gross load which this bill would establish. This bill is entirely inadequate in that respect.

For these reasons, the bill is not approved.

(2) This very bill would impose a fine of $100 plus $2 for each 100 pounds or fraction thereof for violation of the permissible gross by a combination of truck tractor and tandem axle semitrailer.

[fol. 35]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW HOLDING DEFENDANTS LIABLE FOR VIOLATING THE ANTITRUST LAWS—Filed October 8, 1957

## A.

## Findings of Fact.

1. Plaintiffs other than plaintiff Pennsylvania Motor Truck Association (hereinafter referred to as PMTA) are trucking companies engaged in the long distance hauling of freight in interstate commerce (Brief p. 3).*

2. Plaintiff PMTA is a Pennsylvania corporation, whose membership includes most of the other plaintiffs and other trucking firms (Brief p. 3).

3. Defendant railroads are also engaged in the long distance hauling of freight in interstate commerce (Brief p. 3).

4. The individual defendants Clement, Franklin, Graham, Okie, Brown and Fisher were, during the period in suit, May 19, 1949 to date, presidents of various defendant railroads and were members of the defendant Eastern Railroad Presidents Conference (hereinafter referred to as ERPC) (Ex. P. 264).

5. Defendant ERPC is an unincorporated association whose membership consists of the presidents or trustees of the eastern railroads, including all of the defendant railroads, the eastern territory being defined as that north of the Potomac and east of the Ohio rivers. ERPC's activities are financed by assessments paid by the eastern railroads, including all of the defendant railroads (Brief pp. 3, 65).

[fol. 36] 6. Defendant Carl Byoir & Associates, Inc. (hereinafter referred to as Byoir), is a corporation engaged in

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* References are to plaintiffs' brief filed in support of these requests.

the business of public relations, that is the influencing of public opinion on behalf of its clients, in this case ERPC (Brief p. 3).

7. The acts of the various defendants referred to in these Findings of Fact and Conclusions of Law and of those persons employed or engaged by them, were done and performed pursuant to the conspiracy and with the intent and for the purposes and objectives referred to below in Findings of Fact Nos. 12 and 14, and in the case of agents or employees, pursuant to their authority from their respective principals within the scope of their employment or agency. In the case of ERPC, the persons referred to herein as so acting include its members, the Competitive Transportation Committee, its Legal, Research and Public Relations Sub-Committees, and their respective members, and the officers of ERPC. In the case of defendant railroads, such persons include their respective presidents or trustees and their respective other officers, employees or agents (Brief pp. 65-67).

8. Defendant railroads include the major railroads in the eastern territory, such as the Pennsylvania, New York Central, Chesapeake & Ohio, Baltimore & Ohio and the New York, New Haven & Hartford, referred to by defendant Byoir as the "Giants of the Industry" (Brief p. 3).

9. Defendant railroads operate in interstate commerce in 17 states approximately 50,000 miles of track, have assets totaling approximately $15,000,000,000, and annual operating revenues in excess of $4,000,000,000 (Brief p. 3, and Ex. P. 270).

10. Defendant Byoir, during the period in suit, represented twenty-two of the country's major enterprises, and [fol. 37] was a major and powerful agency in creating public opinion and influencing government action on behalf of its clients, including ERPC (Brief p. 3).

11. Plaintiff trucking companies and defendant railroads are competitors in the long distance hauling of freight in interstate commerce (Brief p. 3).

12. On or about May 19, 1949, defendants other than Byoir, acting through ERPC, combined and conspired with

the intent and for the purpose and objective of eliminating truck operators, including plaintiff trucking companies, from the long-haul transportation of freight in interstate commerce in the eastern territory and monopolizing that portion of interstate transportation and commerce for defendant railroads (Brief pp. 6, 7-11, 47).

13. On or about May 19, 1949, ERPC appointed a Competitive Transportation Committee with Legal, Research and Public Relations Sub-Committees to carry out the intent, purpose and objective of the said conspiracy (Brief pp. 6, 7-11).

14. Defendant Byoir joined the said combination and conspiracy with the intent and for the purpose and objective referred to in Finding of Fact No. 12, on or about August 15, 1949, when it was retained by ERPC as its public relations agency (Brief p. 7).

15. In the period August 15, 1949 to December 31, 1953, most of ERPC's funds were spent through Byoir, the actual amounts spent through Byoir by the Competitive Transportation Committee being as follows: August 15 to December 31, 1949 $74,252.12; 1950 $311,136.51, 1951 $320,845.04; 1952 $285,203.88; 1953 $311,620.16. In addition ERPC spent the following amounts through Byoir for what it termed a general public relations program: 1952 [fol. 38] $443,681.15; 1955 $495,214.43, the total spent through Byoir thus amounting to $2,241,953.29 (N. T. 1514-15).

16. The principal means used by defendants to carry out their conspiracy was the third person technique for creating public opinion and thereby procuring legislation (a) imposing or retaining weight restrictions on trucks; and (b) subjecting trucks to ton mile, weight distance or similar taxes, in order to increase their costs of operation and to cause them to lose business (Brief pp. 11-12).

17. The railroads had previously employed the same methods for the purpose of restraining truck competition during the 1930's (illustrated by the activities referred to in the report of the Wheeler Committee of the United States Senate) and after World War II (illustrated by the

advertisements prepared and paid for by The Pennsylvania Railroad, but published in the name of the Pennsylvania Association of Township Supervisors, a public statutory association (Brief pp. 4-5, 5-6).

18. Byoir also had previously employed such methods (illustrated by the activities referred to by the United States Courts in the A & P decisions, in which Byoir was found guilty of violating the anti-trust laws (Brief p. 11).

19. The third person technique consists of forming, reactivating or otherwise using other organizations or individuals who appear not to have any connection with the railroads or any interest in the railroad objectives, as sources of attribution for and to disseminate in their own names propaganda attacking trucks, while the railroads conceal their role in the preparation and instigation of and the payment for such propaganda, and their purpose in having it thus disseminated (Brief pp. 11-12).

20. The third person technique was adopted by defendants so that the public, including government officials, [fol. 39] would not be able properly to evaluate their propaganda thus disseminated and in order to achieve for it wider distribution and more favorable reception (Brief p. 12).

21. Byoir formed the Empire State Transport League in New York and the New Jersey Citizens Tax Study Foundation in New Jersey in order to carry out its third-party program (Brief pp. 12-13).

22. For the same purpose, Byoir reactivated the New Jersey Automobile Owners, Inc., which had been dormant for many years (Brief p. 13).

23. For the same purpose, Byoir also used existing organizations such as the Citizens Tax League of Rochester, New York, the Citizens Public Expenditure Survey of New York, the Save Our Highways Clubs of Tennessee and Ohio, the Pennsylvania State Grange and the Pennsylvania Association of Township Supervisors (Brief pp. 13-16).

24. For the same purpose, defendants used the Farm Roads Foundation of Washington, D. C. (Brief p. 49).

25. Propaganda material attacking trucks and encouraging enactment or retention of weight restrictions and ton-mile, weight distance or similar taxes was disseminated by defendants in the names of the organizations referred to in Findings of Fact 21 to 24 above. The propaganda was prepared by Byoir and paid for by ERPC and in turn, by defendant railroads. The connection of the railroads with this propaganda was concealed and defendants made it appear that the organizations ostensibly disseminating the propaganda were doing so for civic motives not connected with the objectives of the railroads (Brief pp. 12-16).

26. For the same purpose and in the same manner defendants procured the services of Mrs. Bessie Q. Mott, who [fol. 40] was on a regular monthly retainer from Byoir, to circulate in her own name, accompanied by the title "Chairman, Public Affairs Department, New York State Federation of Women's Clubs", the same type of anti-truck propaganda (Brief pp. 19-20).

27. Defendants also caused ostensibly independent surveys and reports to be published repeating their anti-truck propaganda line, which defendants financed, concealing their connection therewith. Among such reports or surveys were the Griffenhagen study in New York, published in the name of the Citizens Public Expenditure Survey; the Princeton Reserch Service polls, of which the results were published by the Citizens Public Expenditure Survey and the New Jersey Citizens Highway Committee; and the Fact Finders Survey, published in the name of Fact Finders Associates (Brief pp. 17-19).

28. Defendants also caused to be published in national magazines and other publications, articles by ostensibly independent authors, again repeating the anti-truck propaganda line of defendants. Byoir prepared or participated substantially in the preparation of such articles and in their distribution. The connection of the railroads with such articles was concealed. These articles included: "The Rape of Our Roads", Frederick G. Brownell—Readers' Digest, July 1950; "Our Roads Are Going to Pot", Myron Stearns—Harper's, September 1950; "History, Trucks & Money", Hardy Burt—The National Grange Monthly, April

1952 and "Who Should Pay For Our Roads", Richard Neuberger—Harper's, October 1952 (Brief pp. 19-21).

29. Byoir also paid for the preparation and distribution of syndicated mats, including pictures, repeating the anti-truck propaganda of defendants. Such distribution was made in the name of ostensibly independent syndicates, concealing the connection of defendants with such distribution (Brief p. 26).

[fol. 41] 30. Byoir caused defendants' anti-truck propaganda to be distributed by public officials, such as Clinton Johnson, referred to below in Finding number 34, and through Theodore Kauer and Harold Cohen of the Ohio Department of Highways, in the name of the Bureau of Public Roads of the State of Ohio, concealing the fact that such propaganda had been prepared by Byoir and the connection of defendants therewith (Brief pp. 21-22).

31. As part of their campaign defendants vilified long-haul truckers as five percenters, which connoted "fixers", and characterized truck operators as evil, sinister wrongdoers and villains (Brief p. 26).

32. Defendants also harassed long-haul truckers by having the anti-truck propaganda referred to above disseminated by their front organizations and individuals to public officials such as the New York sheriffs, the Pennsylvania State Highway Department and the Commission on State Tax Policy of New Jersey (Brief pp. 13, 18, 27).

33. Defendants caused such propaganda to be used and cited as reference sources by their front organizations and individuals and other persons. For example, Byoir had one of its ghostwriters prepare an article "History, Trucks & Money" which was published in the National Grange Monthly under the by-line of Hardy Burt. Reprints of the article were sent out in the names of organizations such as the Grange and Save Our Highways Club. A copy of the article was then sent by a vice-president of the Pennsylvania Railroad to Dr. Milton Eisenhower, at Penn State College, with a covering letter which gave the impression that the railroads had no connection at all with the article. The same technique was used with a film produced in the

name of the Farm Roads Foundation which was based on an article in the Country Gentleman written by a Byoir ghostwriter, by-lined in the name of an ostensibly indepen- [fol. 42] dent author. The film itself did not disclose the railroads as its source and did not disclose the fact that the railroads paid for its production and distribution, which they did. Also, such articles as the "Rape of Our Roads" and "Who Should Pay For Our Roads" were used as reference sources for other articles and were used to influence even persons and organizations already fronting for defendants, who were not aware of defendants' connection with such articles, as in the case of Dr. Dimit (Brief pp. 19-20, 49).

34. Byoir also worked behind the scenes with legislators, legislative committees and other public officials to influence their reports and other official actions without revealing the connection of the railroads. For example, Byoir worked behind the scenes with (a) the Manning Committee of the New York State Senate, in order to achieve passage of the ton-mile tax in New York; (b) with Dr. Sly, Chairman of the Commission on State Tax Policy in New Jersey, to influence its Fifth Report, which defendants thereafter used as their "Bible" in New Jersey and elsewhere; (c) with Van Riper, the Pennsylvania Highway Planning Engineer, in preparing reports for the Secretary of Highways and ultimately the Governor; (d) Clinton Johnson, Public Relations Director of the Maryland State Roads Commission, in publicizing the Maryland Road Test and furnishing material to magazines and newspapers with regard to the test and other matters (Brief pp. 18, 21-23).

35. Part of the propaganda thus disseminated consisted of distorted accounts with regard to the Maryland Road Test. This test measured the effect of various axle loads, as distinguished from gross weights, on a highway in Maryland having subsoils of various kinds. Its primary conclusion was that even axle loads of 22,400 pounds and more caused no cracks in that portion of the highway constructed on a good granular subsoil, whereas they did cause cracking in that portion of the highway constructed on clay [fol. 43] or silt subsoils. The test also indicated that no

damage was done on those portions of the highway which were sealed so as to prevent pumping, as in the turn-around sections (Brief p. 25).

36. The distorted accounts which defendants caused to be disseminated gave the erroneous impression that the Maryland Road Test was a study of the effect of gross weights, rather than axle loads; that it therefore was material in the consideration of Senate Bill 615 in Pennsylvania, which did not increase axle limits; that the test was a "Crackathon"; that long-haul trucks destroyed highways regardless of the type of sub-soil or surface construction; that the test proved that there should be no increase in truck weights; that truck weights should be restricted, and that trucks should be required to pay ton-mile or weight distance taxes because of the destruction they caused to highways (Brief pp. 23-26).

37. As part of their misuse of the Maryland Road Test, Byoir caused to be prepared and distributed an edited version of the official Maryland Road Test film from which was omitted a substantial portion in which the relationship between sub-surface construction and cracking was carefully explained, as well as part of the conclusion which the Deputy Commissioner of Public Roads believed defendants were including in the edited version. The omitted portion of the conclusion again stated clearly the importance of the relationship between proper sub-surface construction and cracking highways (Brief pp. 24-26).

38. Byoir also distributed and caused to be publicized just prior to Governor Fine's veto of SB 615, a tentative draft of a final report of the Maryland Road Test findings, in violation of the direction of the Highway Research Board withholding it from distribution because of its in-[fol. 44] accuracy. In the course of such distribution, Byoir also inaccurately summarized even the tentative conclusions and caused them to be published in Newsweek and elsewhere (Brief pp. 24, 34-35).

39. Defendants began their campaign in New York and New Jersey as a pilot operation, where they tested it, so that they could transplant it to other states, including

Pennsylvania, which they did. Their operations in each state were intended to affect the other states in the eastern territory (Brief p. 27).

40. Defendants succeeded in procuring a ton-mile or weight distance tax in the State of New York as one of the means or steps in carrying out their conspiracy and made efforts to obtain similar legislation for the same purpose in the States of New Jersey, Ohio, Pennsylvania and Indiana, and are still seeking such a tax in Pennsylvania. Ton-mile, weight distance or similar taxes are taxes levied only upon trucks and cargoes over certain weights, based upon the weight and the distance traveled (Brief pp. 27-30).

41. Defendants succeeded in procuring weight restrictions in the State of New Jersey and in retaining weight restrictions in the State of Pennsylvania. Weight restrictions are basically of two different types: (a) laws forbidding trucks to carry gross weights above a certain amount; and (b) laws forbidding trucks to load weights above a certain amount on particular axles (Brief pp. 28, 57).

42. In Pennsylvania defendants opposed any increase in truck weights despite the fact that the Pennsylvania 45,000 pound gross weight limitation created an interstate trade barrier, being 15,000 pounds less than every surrounding state except West Virginia, where the limit was 58,400 pounds (Brief pp. 30, 31).

[fol. 45] 43. Senate Bill 615 of the 1951 session of the Pennsylvania General Assembly (SB-615) would have increased gross loads for tandem axle semi-trailers without increasing axle loads. The axle load limits would actually have been reduced on the tandem axle (Brief p. 38).

44. In opposing SB-615, defendants followed the third person technique described above (Brief pp. 13-17, 31-33).

45. C. Colburn Hardy, the Byoir employee who was in charge of defendants' campaign against SB-615, set up headquarters in the office of the Pennsylvania State Grange, used Grange letterheads, was billed in the name of the Grange, prepared, paid for and disseminated railroad propaganda opposing SB-615 in the name of the Grange,

and instructed his staff to represent themselves as Grange agents (Brief pp. 13-17, 32-33).

46. Hardy and his staff also prepared, paid for and disseminated defendants' propaganda in the name of the Pennsylvania Association of Township Supervisors and other groups opposing SB-615 (Brief pp. 13-17, 32-33).

47. Defendants' campaign in the name of the Pennsylvania Association of Township Supervisors violated the statute defining the powers of that organization (53 Purd. Stat. Sec. 19093-610 to 614).

48. Defendants' immediate objective in their campaign against SB-615 was to defeat the bill (Brief pp. 31-32).

49. When defendants' campaign to prevent passage of SB-615 by the Pennsylvania General Assembly failed, they concentrated on obtaining its veto by Governor Fine, stimulating a flood of protests to the Governor, encouraging anti-truck editorials, planting anti-truck articles and intensifying their anti-truck campaign in the name of the Grange and the Township Supervisors (Brief pp. 32-34).

[fol. 46] 50. As a result of this strong and determined opposition to the bill created by defendants, the Governor called a public hearing (Brief p. 37).

51. Hardy undertook to collect witnesses in opposition to the bill (Brief p. 35).

52. Just prior to the hearing, Hardy sent William A. Reiter, Chairman of the Associated Railroads of Pennsylvania, a statement by Kauer on the Maryland Road Test, to use against the bill, despite the fact that it was irrelevant, and also through Clinton Johnson and others, managed to publicize in a distorted manner the Maryland Road Test tentative draft report in time for the hearing, although the report was officially withheld from publication and was irrelevant (Brief pp. 24, 33-35).

53. Defendants' activities created a strong and determined opposition to SB-615 and the incorrect belief that the Maryland Road Test was relevant in its consideration and had shown that a gross weight of 60,000 pounds would

materially damage Pennsylvania's highway system (Brief pp. 36-39).

54. Defendants' activities were a substantial cause of the veto of SB-615 by Governor Fine (Brief pp. 36-39).

55. As a result of the veto of SB-615, plaintiff trucking companies were injured (Brief pp. 39-40).

56. Plaintiff PMTA was injured by reason of the substantial expenditures which it made to defend itself and its members against defendants' conspiracy (Brief p. 40).

57. Defendants' opposition to SB-615 was unreasonable in that:

[fol. 47] (a) Defendants determined in advance to oppose remedial legislation, regardless of its nature;

(b) It perpetuated the Pennsylvania trade barrier which had a serious adverse effect on plaintiffs and on Pennsylvania industry and agriculture, putting them at a competitive disadvantage as against other states;

(c) Defendants themselves had agreed that a 60,000 pound gross weight was reasonable elsewhere, as in Illinois;

(d) Gross weight increases, unaccompanied by axle load increases, are not objectionable;

(e) The railroads did not have enough freight cars to handle all of the traffic they were offered, but nevertheless they deprived long-haul truckers, including plaintiffs, of traffic, aggravating the shortage to the injury of plaintiffs and the public;

(f) Defendants intended thereby to injure long-haul truckers, including plaintiffs (Brief pp. 48-50).

58. In 1953 in Pennsylvania, defendants' campaign against HB-1390, the counterpart of SB-615, was substantially the same as their campaign against SB-615 (Brief p. 59).

59. Defendants' means of achieving their objective against plaintiffs constituted unfair competition, being based on deception of the public, manufacture of bogus sources of reference, distortion of public sources of infor-

mation, vilification and harassment, and procuring governmental restraints (Brief pp. 50-52).

60. None of plaintiffs' activities either motivated or justified defendants' conspiracy (Brief p. 63).

[fol. 48] B.

Conclusions of Law.

1. In or about May 1949, defendants, other than defendant Carl Byoir & Associates, Inc., combined and conspired in restraint of interstate trade and commerce, for the purpose of monopolizing long-haul transportation of freight, among the northeastern states of the United States, seeking to eliminate plaintiff trucking companies and others as competitors in that field of interstate commerce.

2. Defendant Carl Byoir & Associates, Inc. joined and became part of that combination and conspiracy in or about August 15, 1949.

3. Defendants' combination and conspiracy violated Section 1 and Section 2 of the Sherman Act (15 USCA Sections 1 and 2).

4. The means adopted by defendants for achieving their unlawful objective constituted unfair competition against plaintiffs.

5. Defendants' unlawful combination and conspiracy in restraint of trade injured plaintiff trucking companies.

6. Plaintiff PMTA was thereby injured (a) by the damage to its reputation caused by defendants' campaign of harassment and vilification, (b) by being required to defend itself and its members against defendants' unlawful combination and conspiracy.

7. Defendants' combination and conspiracy were *per se* a violation of the Sherman Act.

8. Defendants' combination and conspiracy were unreasonable and resulted in an unreasonable restraint of trade in violation of the Sherman Act.

[fol. 49] 9. Plaintiffs' conduct neither motivated nor justified defendants' unlawful combination and conspiracy.

10. The fact that the means used by defendants to achieve their objective included procuring or maintaining legislative restrictions on plaintiff truckers does not excuse them from liability under the Sherman Act.

11. Defendants' combination and conspiracy were not privileged under the Constitution.

12. That other groups and individuals may have sought some of the same intermediate objectives as defendants, does not excuse defendants from liability for violation of the Sherman Act.

13. Each and every one of the defendants against whom this action has not previously been dismissed for lack of personal jurisdiction or proper service is liable for defendants' unlawful combination and conspiracy.

14. Defendants' activities were a substantial cause of the veto of SB-615 by Governor Fine.

15. Defendants are estopped to deny that their activities caused the veto of SB-615.

16. Plaintiffs are entitled to damages for the injuries which they have sustained as a result of defendants' unlawful combination and conspiracy.

17. Plaintiffs are entitled to recover the costs of suit, including reasonable attorneys' fees.

18. Plaintiffs are entitled to injunctive relief against defendants' unlawful combination and conspiracy.

Respectfully submitted,

Harold E. Kohn, Aaron M. Fine, Philip P. Kalodner, Dilworth, Paxson, Kalish & Green, By Harold E. Kohn, Attorneys for Plaintiffs.

[fol. 50]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION—October 10, 1957

Clary, J.

The present action involves a suit for an injunction and treble damages under the Sherman and Clayton Antitrust Acts, Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. §1, et seq., and Section 15 of the Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. A. §15, by 41 interstate long-haul truckers and the Pennsylvania Motor Truck Association, hereinafter called "PMTA", against some 35 railroads operating in the northeastern part of the United States; the Eastern Railroad Presidents Conference, hereinafter referred to as the "Conference" or "ERPC", and Carl Byoir & Associates, Inc., a New York public relations firm, hereinafter called "Byoir". Opinions dealing with preliminary motions to dismiss, discovery matters, and a motion to file an amended answer and counterclaim are reported at 113 F. Supp. 737 (E. D. Pa. 1953); 14 F. R. D. 189 (E. D. Pa. 1953), and 19 F. R. D. 146 (E. D. Pa. 1956).

The basic allegation in both the claim and the counterclaim is that the defendants on the one hand conspired to obtain a monopoly of and to drive the plaintiffs out of the business of long-haul freight transportation in the northeastern section of the United States by various and sundry means, which will be more fully discussed later in this opinion, and on the other hand the defendants claim that the plaintiffs themselves were engaged in an illegal conspiracy for the identical purpose to obtain a monopoly of the long-haul freight industry in the same part of the United States and to force the railroads out of that segment of the transportation business in the area.

The Parties.

The individual plaintiffs in this case are each engaged in the trucking business, as stated above, and operate regu-

[fol. 51] larly through Pennsylvania in intercity and interstate long distance hauling. Nearly all of the plaintiffs are members of the plaintiff, Pennsylvania Motor Truck Association, which is a corporation chartered on April 24, 1928, in the Court of Common Pleas No. 4 of Philadelphia County, having its principal office at the 7th Floor, Telegraph Building, Harrisburg, Pennsylvania. PMTA has chapters in every county of Pennsylvania and its members are primarily operators of motor trucks who operate in or through Pennsylvania, including industries which operate their own trucks as well as those operating trucks for hire.

The first defendant, Eastern Railroad Presidents Conference ("Conference"), is an unincorporated association maintaining offices at 230 Park Avenue, New York 17, New York, and 143 Liberty Street, New York, New York. The membership of the Conference includes the presidents or trustees of approximately 35 railroads in 17 eastern states of the United States, operating north of the Potomac and east of the Ohio rivers. The presidents and trustees officially represent their respective railroads in the Conference, which is supported, maintained and utilized by said railroads. The Conference maintains a permanent functioning organization and a staff of paid personnel. It has regular meetings of its members and a paid executive director, presently one David I. Mackie. The Conference operates through a number of committees and subcommittees, including a subcommittee on public relations, described in detail later in the opinion, and also maintains a Bureau of Information at Grand Central Terminal, New York 17, New York. The respective railroads are regularly assessed for the cost of operating the Conference, assessments being prorated based on the size and income of the respective roads so that the Conference is in large measure supported by the big railroads, the end result being that the larger railroads contribute proportionately a much larger share for the Conference than do the smaller railroads.

[fol. 52] The individual defendants who were originally sued were the presidents or past presidents of the several railroads, members of the Conference at some of the times covered by the complained of actions, or were key members of the Public Relations Subcommittee of the Conference.

The defendant railroads are all Class 1 railroads, most of which operate in Pennsylvania, and all are active members of the Conference.

The defendant Carl Byoir & Associates, Inc. is a New York corporation, engaged in the public relations business, with its principal office at 10 East 40th Street, New York City, New York.

## The Contentions.

Plaintiffs in their complaint, after identifying the parties, summarize the respective relations of each defendant in the transportation of passengers and freight in the northeastern section of the United States. The complaint then alleges that in May of 1949 the defendants embarked upon an illegal conspiracy in violation of the antitrust laws of the United States, the purpose and objective of the conspiracy being to eliminate the plaintiffs as well as others in the same industry as competitors to the railroads in the field of long-hauling of freight, and to carve out exclusive railroad monopolistic spheres of operation in the said industry to the end that the railroads would have a monopoly on freight hauling in interstate commerce. The complaint charges that ERPC appointed a Committee on Competitive Transportation (ER-TC), charged with carrying out the details of the conspiracy, and that that committee retained defendant Byoir as its public relations agent for the express purpose of effectuating the object of the conspiracy. Further, that Byoir in conjunction with the ERPC and the railroads, acting through their presidents and/or trustee, or subcommittee of the Committee on Competitive Transportation, embarked upon a campaign designed specifically [fol. 53] to impede the operation of the trucker-plaintiffs in every possible way, and in pursuance thereof, among other things, vilified and defamed the plaintiffs by circulating to the public generally, to public officials, and to suppliers and customers of the plaintiffs, false and malicious reports of and concerning the plaintiffs in the conduct of their business of hauling freight; formed so-called "independent" citizens groups organized to circulate false and malicious propaganda attacking the plaintiffs, which propaganda was in fact the product of Byoir and its employees issued on

behalf of the railroads but made to appear to emanate from independent sources; sought to secure the passage of legislation favorable to the railroads and injurious to the truckers through the instrumentalities of the so-called "independent organizations"; attempted to and actually prevented the passage of legislation in Pennsylvania favorable to the truckers (S. B. 615) by using and duping as well as bribing public officials and officials of independent organizations; all to the end that the defendants might bring about the destruction of the plaintiffs' business and the elimination of them as competitors. The complaint charged that the conspiracy continued from 1949 to the date of the institution of the suit on January 17, 1953; has resulted in disparaging the plaintiffs' business in the public mind; has created great public hostility to the plaintiffs; has interfered with the legitimate conduct of their business and the furtherance of their business, resulting in increased cost to shippers and consumers, particularly in areas not served by the railroads; has increased the expense of operation by the plaintiffs, and finally has caused loss of accounts and profits and prospective profits to the plaintiffs.

The defendants originally answered the complaint but did not counterclaim. In their original answers the defendants denied the existence of any conspiracy, alleged that the plaintiffs in competition with the railroads were enjoying enormous public subsidies in the matter of the free use of public highways; that they were unfairly competing [fol. 54] with the railroads by carrying loads substantially in excess of the legal weights permitted by the several states; that mere fines for overloading were not sufficiently high to stop the overloading; that the overloaded trucks destroyed the highways; that any effort made on behalf of the railroads to "improve their competitive position in the climate of competition in the field of long-hauling of freight" was ultimately directed to the attainment of legislative measures which involve the right of free speech and right to petition the legislature, both constitutional guarantees and therefore without the orbit of the antitrust laws; and finally that everything done by the railroads was within the "rule of reason" in free competitive enterprise. The railroads also contended that as taxpaying citizens they had the

right to point up a growing public abuse in that heavy trucks ruined highways, requiring a greater and greater expenditure of public funds, and that roads and bridges, underpasses and overpasses had to be reconstructed to provide facilities for the increasing volume of traffic and size of vehicles, all of which was to the detriment of the railroads which had to pay part of the reconstruction costs of such facilities.

Early in 1956, after the case had been assigned an October 1, 1956 trial date and during the pendency of discovery procedures, some of the railroads and ERPC sought permission to and were allowed to counterclaim against the truckers. The counterclaim charged that the truckers themselves were engaged in nefarious practices against the railroads and with the sole purpose and objective of themselves obtaining a monopoly of and driving the railroads out of the long-haul transportation business in the northeastern section of the United States. It averred that the truckers had engaged in identical public relations programs about which the truckers in their complaint had complained of the railroads; that they made use of the same "third party techniques" charged against the railroads; that they used bogus organizations to advance their cause as against the rail-
[fol. 55] roads, and, finally, that they in concert sought to so injure the railroads as to eliminate them as competitors in the long-haul transportation field. On these contentions the case went to trial solely as to the issue of liability. Each side has now concluded its testimony with respect to the question as to whether there was a conspiracy on the part of either, or both, to monopolize long-haul freight transportation in the northeastern part of the United States. The Court will in this opinion resolve that question.

## Historical Background.

The period in which the factors involved in this case developed has been generally limited in the proofs to the period from 1930 through 1955. The controversy itself involves the loss of business by the railroads to the long-haul trucks in interstate commerce during that particular period. It is candidly admitted by defendant-railroad companies that in the year 1930 the competition for long-haul

freight transportation was de minimis. There were only some 28,000 of the so-called "big trucks" in the entire United States. However, in the early 1930's with the improvement of highways and mechanical equipment, it became obvious to the railroads that the carriage of goods by trucks, instead of by railroad, was a growing business with which the railroads had to concern themselves. Accordingly, a joint committee of railroads and highway users was instituted to consider the problem. This committee was comprised of truck manufacturers, railroad officials, and officials of motor federations and associations, representing only the then organized automobile clubs. The truckers, as such, had up to that time formed few associations and those in existence were not very forceful in representing the trucker. In any event the truckers were not represented on the committee. That committee filed a report recommending that users of highways be charged for such use as they made of the highways and that a base [fol. 56] construction rate for roads should be determined with reference to the smaller private automobile and so-called pickup truck and that any excess cost should be met in increased fees to the heavier vehicles proportional to the amount of the increased cost. The committee also jointly approved standards of road construction, known as the AASHO standards, promulgated by the American Association of State Highway Officials, which standards recommended a maximum of 18,000 pounds for axle loads for all vehicles. Significantly, however, the recommendation of the Commissioner of Public Roads of the United States of standards for gross weight and size of vehicles to make these standards uniform among the several states was, primarily at the instance of the railroads, not accepted. In the Atterbury-Swayne Report (containing the Committee's findings) it was recommended that limitations as to these two items be left to individual state action.

That the railroads were very seriously concerned with truck competition in the latter part of the 1930's and lobbied for antitruck legislation, both in Congress and in the Legislatures of the several states, is completely demonstrated in the report of the Committee on Interstate Commerce, pursuant to Senate Resolution 71, (74th Congress) Report

No. 26, part 2, rendered on October 16, 1941 to the 1st Session of the 77th Congress, and known as the "Wheeler Report". This report condemned the railroads for what the committee termed as being "more concerned with the selfish interests of a few rather than the needs of the transportation industry as a whole". The report further pointed out that the method adopted by various railroads and railroad associations to combat the inroads of the trucking industry was not a method designed to meet truck competition by improvement of railroad service, nor was it a means for adjusting the railroad industry to the fact that there are certain functions for which motor vehicles are especially adapted. It concluded that the program as developed at [fol. 57] that time planned to impede truck and bus competition by the erection and enforcement of legal barriers. The program had its beginning at least as early as 1932. It had two major aims: the enactment of laws and ordinances designed to harass the trucking industry, and the stimulation of enforcement of such laws, ordinances and regulations. The above noted report further condemned the action of the railroads in secretly subsidizing so-called independent organizations and foundations which stated publicly that they were only interested in the objective "presentation of facts" but which were actually either completely subsidized or dominated by the railroads through financial support and otherwise.

Despite the combined antitruck opposition of the railroad associations of the United States, the trucking industry continued to flourish. At this point I must, for clarity in this opinion, state that hereafter when the term "trucking industry" is used, it will be used in connection only with that small segment of the entire trucking industry called the "long-haul truckers" which has to do with vehicles of a minimum of 18,000 pounds axle load and gross weight of 30,000 pounds and upward. The number of this type of motor vehicles or so-called "big trucks", while increasing yearly, at present constitutes only 1% of all vehicles using the public highways. The case under consideration is limited to that group.

The Pennsylvania Railroad itself entered the trucking field during the decade of 1930 to 1940 and operated a fleet

of long-haul trucks. In charge of this operation was one Mr. Raymond J. Littlefield, who was at that time, had been for many years before, and still is one of the experts in the railroad business in the analysis and study of the trucking industry in competition with the railroads. This operation was later ordered discontinued, and as testified to at the trial, based largely on the premise that the weight restrictions of the State of Pennsylvania prevented operation of [fol. 58] these units at a profit. With the advent of World War II and because of government restrictions on the manufacture and operation of motor vehicles, the trucking industry as such and as a competitor to the railroads collapsed. The railroads during World War II carried 95% of all freight and 90% of all passengers. Antitruck activities during this period on the part of the railroads were completely abandoned. With the conclusion of World War II and with the truck manufacturers again in operation, bigger and better trucks appeared on the market and were put into operation by the trucking industry. From 1946 to 1949 marked inroads were made by the truckers in the competitive market of long-haul interstate freight. This was apparent to the railroads and they frankly admit in this action that the competition was obtaining business from shippers who for many years had used railroad facilities exclusively. There was a marked reduction in carloadings in many particular commodities even though the total production of that commodity in overall manufacturing totals exceeded by far the production of previous years. It was clearly apparent to the railroads that not only the flexibility of movement but the saving of time were important elements in this erosion of railroad business, despite the uniformly much higher rates which the shippers were forced to pay to the truckers as contrasted with the railroad rates. It was clearly apparent to every railroad official concerned with the question that steps had to be taken to preserve the economic status of the railroads in the competitive market.

The trucking industry in the meantime had not rested on its oars. After the Atterbury-Swayne Report the truckers banded together in a national organization, known as the American Trucking Association, and State Trucking

Associations, similar to PMTA, were organized in every state. These associations became very active in their respective states, lobbying for increased weight limits so as to permit the carrying of greater "pay loads". In general, [fol. 59] their activities resulted in success in raising the minimum weight limits and permitting the carrying of heavy loads. In Pennsylvania the weight limit as of 1941 was 18,000 pounds for axle loads. In 1943, as a temporary war measure, they sought and obtained a limit of 20,000 pounds per axle load. In 1945 by Act of the Pennsylvania Legislature the temporary war measure became a permanent measure and remained as the axle load limit throughout the period involved in the present proceeding. Again in 1947 and 1949 the truckers sought an increase of weight limits in Pennsylvania, which limitations were actively opposed by the association of railroads as well as several other organizations to be discussed later. The bills were never passed by the Legislature. During this period many unscrupulous truckers violated the weight limits rather consistently on the theory that it was cheaper to pay the nominal fine of $50 for overloading than to keep the weight of the truck at legal limits; the excess load paying far greater dividends than the charges in the nature of fines for overloading. It was in this setting that the activities hereafter related occurred.

## Railroad Activities.

As aforesaid, the use of long-haul trucks for interstate hauling of freight had increased so enormously by May of 1949 that it was a matter of immediate and vital self-interest to the railroads to do something about the erosion of what had been up to this time almost an exclusive monopoly of long-haul freight transportation. At first blush, to the ordinary person it would appear that the primary concern of the railroads might have been directed to improving service and to attempt to meet by more flexibility and speedy delivery the growing competition of the truckers. The evidence in this case has disclosed there were certain areas wherein the trucks could not compete. It was testified that the trucks could not compete with the

railroads in taking the coal out of the mountains of West [fol. 60] Virginia since one diesel engine could take a great number of cars on the downgrade of the West Virginia mines to the Norfolk breakwater. That the railroads would continue to enjoy this type of business was completely self-evident. On the other hand, the greater flexibility of the truck and the speedier delivery of goods were elements in the competitive market which the railroads might themselves have attempted to meet by the use of trucks or otherwise. The door-to-door feature of truck delivery was also important. However, the record in this case is barren of any attempt on the part of the railroads to adjust their thinking and their actions to meet this definite threat to a segment of business theretofore enjoyed by them. They engaged in what has been termed throughout the trial of this case as a "concert of action" to "improve their position" in the long-haul freight competitive market. And here is how they did it.

In May of 1949 the evidence discloses that the top executives of the Pennsylvania Railroad, before attending the May 19th, 1949 meeting of the Conference, were considering a campaign for Federal and State taxes against users of highways, waterways, etc. The recommendation which came out of this consideration was that they should explore the possibility of organizing private motorists and other groups to be held out to the public as completely nonrailroad inspired for the sole purpose of restricting the truckers by making their operations so expensive that they could not operate at a profit. The obvious corollary is that the railroads would be the beneficiaries of these restrictions. On May 19th, 1949, at a meeting of the Conference, there was appointed a Competitive Transportation Committee with Subcommittees designated Legal, Research, and Public Relations. David I. Mackie, then vice-president of the Delaware & Lackawanna Railroad, was made Chairman of the Legal Committee. Raymond J. Littlefield, tax agent and later general agent of the Pennsylvania Railroad, was made Chairman of the Research Committee. Thomas J. Deegan, [fol. 61] Jr., then executive vice-president of the Chesapeake & Ohio Railroad, later staff vice-president of the Allegheny Corporation, operators of the New York Central

Lines, was made Chairman of the very important Public Relations Subcommittee. While these three subcommittees maintained an effective liaison, the most active and most potent of the committees was the Committee on Public Relations. Deegan and his subcommittee determined on a plan of operation. The single objective of the campaign was harassment of the long-haul truckers. One of the objectives was the enactment of legislation, not under the sponsorship of the railroads but by others acting on their behalf, by what was called in inoffensive and pleasing language, "The third-party technique".

The campaign was to begin in New York, New Jersey and Ohio, and other states were to be brought in later as the program developed, consistent with the degree of success of the program. It was also determined that the campaign should be handled through an independent public relations firm. A number of public relations firms were interviewed and of the four or five selected for interview, all were leaders in that particular field. It may be noted in passing that of those interviewed and who submitted proposals, about which proposals testimony was given at the trial, each and every one of the suggested programs provided for a campaign of publicity to put the truckers in a bad light with the public; to encourage normal public resentment of the motoring public to the operation of big trucks on the highways; to secure the assistance of organizations which were apparently "independent and public spirited" in the campaign against the truckers, and to create a demand for legislation penalizing the truckers either by limitation of size and weight or the imposition of user taxes which would make their operation unprofitable.

A presentation was made by the defendant-Byoir firm prior to the execution of the contract on August 15, 1949. Byoir's presentation laid great stress on the success of [fol. 62] that firm in prior legislative campaigns, particularly its success before the Louisiana Legislature in reducing a tax on sulphur; in the Spring of 1938 before the New York Legislature in opposing a chain store tax; in connection with A & P activities which will be discussed later in the opinion; in 1948 before the Congress of the United States in connection with the distilling industry, and finally in

connection with the manufacturers of floor and wall tile with regard to building code changes which Byoir claimed his firm had secured for that industry in some two thousand cities. After the contract was awarded a memorandum of agreement was executed providing for payment to Byoir of $75,000 a year, plus reimbursement of each and every expense of any sort involved in the campaign. Byoir immediately organized a staff to put the program into effect and execution. The understanding of the Byoir organization as to its duties in connection with the campaign, set forth in extenso in Exhibit P5, is entitled "The Objectives".

While the ultimate objective is shrewdly set forth as legislation affecting the truckers, the intermediate goals are also set forth, all designed and aimed at injury to the truckers. These objectives, including the crystallization of motorist resentment arising from commercial heavy truck operations over the roads, were designed to arouse the public generally of the need to obtain new methods of financing public highways and by methods which would not appear to emanate from railroad sources. The total objectives were ostensibly set forth in a memorandum to the Department Heads of Byoir by Reynolds Girdler, Account Executive of the ERPC Account, dated September 13, 1949, in which he paraphrased the National Transportation Policy of Congress to suit his own needs, interpreting it for the purposes of the campaign as a National Legislative Policy and that (1) airlines should be used for speed; (2) trucks for short hauls and (3) only railroads for long hauls. He pointed out that if this program could be made effective [fol. 63] through public relations the railroads' financial troubles would be at an end. He also pointed out that "our" newspaper stories, magazine articles, pictures and radio programs will be concerned with what the national transportation policy should be, dramatizing highways and heavy trucks in the following particulars: (1) highway construction costs; (2) highway safety and the part trucks play in lack of safety on the highways; (3) highway damages by trucks; (4) state revenue and expenditures; (5) general taxation stories; all geared to reflect discredit upon the heavy truck industry and all to be done without attribution to the railroads. The magazine department of Byoir

was directed to "plant" stories in magazines for later use in the campaign as authoritative sources of factual information. More will be said of this later in the opinion.

It was estimated that the cost for the first year would exceed $350,000. Girdler's memorandum was circulated to the railroads and rather glowing commendations were received from several of the committee members involved, particularly from Walter Franklin, President of the Pennsylvania Railroad; Raymond J. Littlefield, who has been introduced above; and Walter Touhy, President of the Chesapeake and Ohio Railroad, Chairman of the Competitive Transportation Committee; as well as others.

While it would be very interesting to outline the Byoir campaign over the period 1949 to 1953, the details of which were testified to by the many witnesses called in this proceeding, it would unduly prolong this opinion and such an outline of details is unnecessary for a complete understanding of the case. Therefore, the campaign as inaugurated and carried out by Byoir and the Committee on Competitive Transportation of the Conference and its total effectiveness will be only briefly outlined under activities embracing: (1) The State of New Jersey; (2) The State of New York; (3) The State of Ohio; (4) Magazine Activities; (5) Road Test One—Maryland and its connotations; (6) The State of Pennsylvania; and (7) The Campaign of Vilification.

[fol. 64] New Jersey Activities.

While the program was geared for operation throughout the 17 states in the northeastern part of the United States, the Committee on Competitive Transportation determined to center its efforts in three states—New York, New Jersey and Ohio. At the outset, one C. Colburn Hardy was selected as the Byoir representative to inaugurate the New Jersey campaign. Hardy had for many years been in the public relations business and had served several terms as a New Jersey Legislator. Liaison was effected with the President of the Associated Railroads of New Jersey, one Blackson, and his assistant, one Simpson, with David I. Mackie, vice-president and general counsel of the Delaware & Lackawanna Railroad; one Pevler, vice-president of the Pennsylvania Railroad, and one Viviano, general

counsel for the Lehigh Valley Railroad. It was determined to reactivate an organization known as the New Jersey Automobile Owners, Inc. of which one Stelljes was executive vice-president, and one Fred Fox, secretary. Its offices actually were in the Byoir organization headquarters at 10 E. 40th Street, New York City, New York, with a mailing address from a small apartment in an apartment house in East Orange, New Jersey. In addition there was organized a new group, the New Jersey Citizens Tax Study Foundation, an organization whose dominant member was Hardy, its secretary.

The general purposes of the campaign were: (1) to stir up as much resentment against the trucking industry as was possible among highway users, with special emphasis upon the motorists, farmers and local truckers; (2) the lowering of truck weights and the increase in truck fees; (3) a weight-distance tax whereby users of New Jersey roads would be charged a mileage fee based upon weight carried and distance traveled on the highways of New Jersey. Hardy with his knowledge of New Jersey politics was in a key position to be extremely effective in such a [fol. 65] campaign. He had the help of Blackson, David I. Mackie, above mentioned, who was no stranger to legislative halls, and the research facilities of the Eastern Railroad Transportation Committee headed by Raymond J. Littlefield. Macwithey, President; R. J. Stelljes, Vice-President, and Robert Fox, Secretary, of the New Jersey Automobile Owners, Inc., were all avid publicity seekers who lost no opportunity to make speeches, give press releases of the speeches and demand of the legislature restrictions on the trucking industry. In this they were ably assisted by Hardy who paid all of their expenses, wrote practically all of the speeches, sent out thousands of publicity releases, prepared and printed in New York but mailed in New Jersey by a representative of Byoir. Copies of each release, however, were sent to the three officers in order that they be kept currently informed of Byoir's activities on their apparent behalf. Not one word of the railroads' part in the picture ever seeped through to the objects of their consideration—the long-haul truckers.

Another suggestion which was made part of the campaign was to create by grass-root methods, through editors of weekly papers, The Grange and other organizations, a demand for more highway funds. The object of this was clearly to point up increasing costs of road building and maintenance, and after having created the demand to suggest and then campaign for the weight-distance tax. The organization of the New Jersey Citizens Tax Study Foundation in this posture of the campaign began to pay dividends. One Fred K. Goodwin was the Executive Director and he was paid by Byoir and worked very closely with Hardy. A questionnaire was prepared and circulated to obtain "independent public reactions" to possible sources of tax money. The questionnaire was so devised with the help of the Byoir organization to make certain that a weight-distance tax would be the least painful choice to the general public. With that as a statistic and from an apparently independent authoritative source, Byoir was able to step [fol. 66] up among editors, writers and other media of communications the clamor for a weight-distance tax. It must also be remembered that all during this time a campaign of vilification against the trucking industry generally was going forward, the outline of which campaign will be later referred to in this opinion.

New Jersey had two years earlier adopted a new constitution. One of the elements was a tax study commission headed by Dr. John S. Sly of Princeton University, who also headed the Princeton Surveys. Dr. Sly was apparently, to the public at least, one of the most outstanding and disinterested persons in the State of New Jersey in connection with the tax study. It was the committee headed by him that made recommendations to the Governor and to the Legislature with respect to taxes in the State of New Jersey. However, the evidence in this case clearly indicates that Dr. Sly was working in the interest of the railroads. According to documents from Byoir files he worked in so close an association with Hardy that he was perfectly willing to accept Hardy's recommendation to place before his committee the virtues of the weight-distance tax, and in such a manner that the connection of the railroads therewith would be completely concealed or obscured. The results of

this campaign were extremely pleasant insofar as the railroads were concerned. Without elaborating too greatly upon the details of the campaign it will be sufficient to state that because of the ostensible grass-root campaign emanating from persons apparently with no railroad ties, the maximum axle load permissible on the highways of New Jersey was reduced and a marked increase in truckers' fees was obtained. While the campaign was not completely successful in that no weight-distance tax was imposed upon the trucking industry, the responsible officials of ERPC expressed their complete satisfaction with the results actually obtained.

In connection with the campaign to persuade editors to take an antitruck position, Byoir through Hardy subsidized [fol. 67] an apparently independent journalist who distributed a column of political news to the editors of weekly newspapers in New Jersey. Byoir provided complete coverage during the legislative season of eight weeks for all of the weekly newspapers of New Jersey, at no charge. Needless to say the columns so syndicated did nothing to advance the cause of the trucking industry and the columnist was well compensated by Byoir for his efforts on behalf of the railroads, whose connection with the activity was carefully concealed not only from the public but from the editors who used this material.

Representations were made to the then Governor of New Jersey, Alfred E. Driscoll, on behalf of the New Jersey Automobile Owners, Inc., protesting against a rise in the regular gasoline taxes; a rise conceived in the mind of Byoir and one which this record fails to disclose had ever been proposed by any responsible organization. The purpose of this, of course, was to again deliver a broadside against the trucking industry and to urge the imposition of a weight-distance tax against it. Hardy himself together with Stelljes traveled the length and breadth of New Jersey speaking before civic organizations, such as; Lion, Rotary and Kiwanis Clubs, and not one of the thousands of the businessmen of New Jersey who heard these speeches and violent denunciations of the trucking industry had the faintest conception that the ERPC was paying for the very gasoline that brought the speaker to the door of the meeting

hall. All in all Hardy and his railroad friends were eminently successful in their attempt to arouse the people of New Jersey to strike out at the trucking industry through the method of weight limitations and higher fees, and that work was not done to help the railroads but to injure the truckers. There was nothing of a constructive nature done by Hardy at any time to obtain better public relations for the railroads nor to secure any legislation favorable to the railroads. The truckers throughout remained the target [fol. 68] of this subterranean campaign to place them in a light with the public which was anything but favorable and wholesome.

One final observation on the State of New Jersey and the limits to which Hardy went to conceal the railroads' participation in this campaign. One astute editor questioned the sincerity of the New Jersey Automobile Owners, Inc. and in effect called it a paper organization "fronting" for some unknown principal. Not only did Hardy answer the letter denying any connection, particularly with the railroads, but he circulated his reply to every editor of every newspaper in the State of New Jersey in words of his own choosing on letterheads and in envelopes of Automobile Owners, Inc. paid for by the railroads and with postage paid for by the railroads. The ostensible writer of the letter was Stelljes, but the thoughts and words were Byoir's and Hardy's. The contents of the letter were nothing but complete fabrications and falsehoods. Many other illustrations of the type of campaign engineered by Hardy, Mackie, Littlefield, and others might be given but they are not necessary to a decision in this case.

## New York Activities.

When Byoir undertook to represent the railroads in the summer of 1949, it found in New York State that the railroads had already enlisted the aid of many civic organizations and were themselves utilizing the "third-party technique". Outstanding were two organizations: The Citizens Tax League of Rochester, New York, whose secretary A. J. Menzie apparently delighted in public controversy, and The Citizens Public Expenditure Survey, Inc., an independent public-spirited organization originally

formed for the purpose of scrutinizing the budgets of all governmental political divisions and subdivisions from the state itself to the smallest municipality.

Through agricultural agents employed by them the railroads had been able to enlist the sympathetic coopera- [fol. 69] tion of many prominent Grange members to present their viewpoint against the truckers to the public. But they were in need of statistics to bolster their contentions and it was important that any review come from an apparently independent source. They decided that should a survey of highway users and the revenue derived from them for road construction and maintenance be sponsored by the railroads it would be of little, if any, value. Therefore, it was determined to have such a survey made by an independent source. Griffinhagen & Associates, consultants in public administration and finance, with offices in Chicago, New York, Boston and Los Angeles, were chosen to make the survey. The sponsor was The Citizens Public Expenditure Survey, Inc. This survey which was completed and documented in February of 1950 again had no apparent railroad relation and seemingly was what it purported to be, a completely objective independent analysis of the highways and highway use and revenue conditions in the State of New York. To put it in its proper perspective, however, the evidence in this case discloses that during the years 1951, 1952 and 1953, substantial "subscriptions" in uneven amounts were made to the Citizens Public Expenditure Survey, Inc. by the Pennsylvania Railroad. The evidence also discloses that Mr. Littlefield, after the passage of the weight-distance tax bill on trucks in New York, sought a vote of thanks for Mr. Dugan of the New York Central for his efforts in bringing Griffinhagen to New York for the survey and the results of the survey. Over and above that, weekly reports of Kiely, Byoir's New York representative for the ERPC, clearly indicates that Kiely directed the activities of both Walter Howe, executive director of Citizens, and one Finke, head of its so-called research department. The closely knit cooperation of these three individuals was such, together with the "subscriptions" which appear rather to be "assessments", that the inference is inescapable, and the Court so finds, that the railroads paid for

the survey and subsidized the activities of Messrs. Howe and Finke.

[fol. 70] With the Griffinhagen report as a basis, Kiely toured New York State and "sold" the railroad story to editors, the Mayors Conference, County Supervisors, Chief of Police Associations, Rural Letter Carriers, Members of the Grange, and other organizations. He also worked closely with The Citizens Tax League of Rochester, New York, and used that organization for the dissemination of literature unfavorable to the truckers. Byoir absorbed all of the costs of this distribution and paid the secretary Menzie a substantial fee of several hundred dollars for the so-called research, which the Court finds was for the use of his position. In order to obtain more extensive publicity Byoir formed the Empire State Transport League, a strictly paper organization, with its principal office at a desk in a Public Stenographer's office in Albany, New York. Byoir induced many prominent New Yorkers to lend their names to this paper organization. The amount of antitruck literature and news releases critical of the truckers put out by this organization was prodigious. Of course, it was all at the expense of the railroads without any attribution of responsibility to the railroads.

While there is naturally a scarcity of evidence as to the connection of Byoir with the Legislative Committee of the New York State Senate, which had the weight-distance tax bill before it in the year 1950, it is significant that when Senator Manning, the head of that committee, came up for election in a later year he became extremely resentful of rumors that Byoir had written the Senate report recommending the weight-distance tax and refused to let Byoir relate any further remarks to him. The inference is again inescapable, and the Court so finds, that Byoir's representatives were working in close contact with his office during the pendency of this particular piece of legislation and were responsible for many of the news releases which came out under his authorship.

As in the case of Stull in Ohio, who will be later discussed, and Hardy with Pevler and Mackie in New Jersey, [fol. 71] Kiely did a magnificent job of grass-root selling. He persuaded the Rural Letter Carriers, the Grange, and

the Mayors Conference to adopt resolutions at their state conventions, several of which were actually written by him, denouncing the truckers and urging strict enforcement of the weight-distance tax. Under the letterhead of the Empire State Transportation League he urged the Sheriffs of every county of the state to enforce the strict penal provisions of the weight-distance tax, particularly with regard to overloading. He sought out legislators, particularly members of the Highway Committee, and solicited the introduction of and urged the passage of an act giving local communities, through their local police organizations, the right to arrest the drivers of overladen trucks and impound the trucks if necessary. The bait held out was that local communities could profit from the high penalties set forth in the weight-distance tax law for overloading. He worked also with his friends in the Grange, in the Mayors Conference, and in other organizations to put pressure upon the political leaders to see that the Legislative Committees were composed of legislators favorable to the railroad point of view.

In addition to the Griffinhagen report, the Byoir organization was able to obtain further statistics against the heavy trucks by so-called public opinion polls. The media for obtaining this information was Fact Finders, Inc. and the Princeton Polls, the latter headed by Dr. Robert Sly, head of the New Jersey Tax Study Commission. The questions were framed in the light of a demand carefully nurtured by Byoir, through the Grange, the Mayors Conference and others, to obtain a greater allotment of state funds for local community roads. While very astutely, and apparently innocently worded, the bold import of the questions presented to individual persons ran substantially as follows: Since more money must be obtained for roads, do you prefer: (1) increase in passenger car registration fees; (2) increase in the motor fuel tax; (3) increase in the charges made for the use of the highways by the heavy [fol. 72] trucks? It could certainly be less than human if an overwhelming majority of the people approached would not vote for the third proposition, to wit: tax the truckers! These public opinion polls at the cost of many thousands of dollars were inaugurated by and subsidized by Byoir on be-

half of and at the expense of the railroads. The results of these polls received the widest publicity that Byoir could give them both on the metropolitan level of all the larger cities of the State of New York, in National magazines, where possible, and with particular emphasis on the country weekly newspapers. In that regard it might also be noted that Kiely was also able to obtain the cooperation of a few editors of weekly newspapers who printed strong editorials against the truckers.

Defendants argue that these antitruck statements contained the considered opinion of the editors and that it was merely another facet of the freedom of press and speech guaranteed by the 1st Amendment to the Constitution of the United States. This argument would certainly carry great weight were it not for the fact that Kiely, a highly placed and highly paid employee of Byoir, had written the editorials himself in furtherance of the Byoir-railroad objective. In accordance with standard operating procedures, these skillfully written diatribes against the truckers received the widest possible publicity and became part of a Byoir kit for presentation to the next editor.

In this posture of the case it might be well to also note that much of the success of Kiely and the others in "planting" these ideas with editors was due to the fact that apparently independent writers of recognized stature had written articles about the damage that truckers did to roads. As will be related hereafter under the headings "Magazine Activities" and "Campaign of Vilification", these articles in outstanding magazines of national circulation, the names of which will also be hereafter related, were based almost exclusively on data furnished by Byoir and written or edited by Byoir before appearing in these magazines.

[fol. 73] To keep the case in proper perspective we must recognize that Kiely, Stull, Hardy, et al., were on the payroll of the ERPC through Byoir; that their entire salaries and expenses were reimbursed by ERPC to Byoir; that their job was to create public dissatisfaction with the truckers, arouse animosity against the truckers, and all to the final purpose that the railroads might at the least limit the activities of the truckers in the long-haul industry or if completely successful destroy them as a competitive factor

with the railroads. Bluntly stated, all were working to accomplish injury to a business competitor within the prohibition of the Sherman and Clayton Antitrust Acts.

The results of Byoir's work in New York in conjunction with Messrs. Littlefield and Deegan were extremely gratifying to the Research Subcommittee of the ERPC. In its report dated June 20, 1951 to Mr. Walter Tuohy, Chairman of the Special Transportation Committee, the following pertinent language is found:

> "7. Research Committee has acted more or less as liaison between State Railroad Associations and the Carl Byoir group. In June, 1949, the Policy Committee named the states of New Jersey, New York and Ohio as trial states. The Carl Byoir group, under the direction of Mr. Girdler, placed the facts before state administrations and otherwise gave the states a vast amount of help, resulting in favorable truck legislation in New Jersey and New York.
>
> "8. The Mileage Tax Bill, which passed the New York legislature in April of this year, was of outstanding importance. This is the first state east of the Mississippi to put a substantial mileage tax on trucks. Other states are watching this development. The New York authorities advise that they expect to build 50 weighing stations scattered throughout the State.
>
> "9. After the New York Bill passed, the Carl Byoir people concentrated on Ohio. A Bill was passed [fol. 74] increasing truck license fees about 30%. There is much more to be accomplished and the campaign will be resumed at the next session of the legislature.
>
> "10. The first of June, the railroads of Pennsylvania unanimously requested the help of the Carl Byoir people, and a man has been assigned."

## Ohio Activities.

The State of Ohio posed one peculiar problem to the Byoir organization. Representing the Goodrich Tire & Rubber Company, which of course was vitally interested in

automotive equipment and the sale of tires, Byoir found itself in the predicament of representing opposing interests. Nevertheless, following the pattern of New Jersey, Byoir threw the weight of its organization behind Donald Stull, who had charge of the Ohio activities. The success of Stull in Ohio in advancing the interests of the Byoir-ERPC plan was little less than phenomenal. T. J. Kauer was Director of the Ohio Department of Highways; Harold Cohen was the Chief of the Bureau of Public Relations for the Ohio Department of Highways. Kauer was also Chairman of the Interregional Council on Highway Transportation which had charge of the Maryland Road Test. Stull had complete access to their offices and worked closely with them. He also, through Kauer, apparently had entree to the office of Governor Lausche. Building up a grass-root campaign against the truckers through the use of "independent factual data" obtained from sources apparently independent but based completely on Byoir material, he was successful in creating a wave of indignation towards the truckers which resulted in an increase of fees to the truckers in 1951 of approximately 30%. Again, through Kauer, he was able to "educate" the members of the Ohio Legislative Highway Investigating Committee. In 1952, according to a Byoir report, Stull had done such "an efficient job of education" that there arose a public demand for taxation on heavy trucks.

[fol. 75] There was also a gubernatorial campaign in Ohio that year. Charles Taft, the Republican candidate, adopted the proposition that trucks should pay higher taxes "based on weight carried and miles traveled". Stull reported to Byoir that up to three weeks before Election Day, Lausche, the incumbent, had planned to campaign solely on his record and was backing away from the ton-mile tax as a too familiar story and one already chosen by his opponent. What he needed, he told his aides, was "a dramatic story that could be told over TV". That was all Stull needed (according to Byoir). Using newspaper clips, editorials, magazine articles, etc., which as will be demonstrated later were practically all Byoir-inspired and paid for by ERPC, Stull demonstrated the apparent widespread public interest in the ton-mile tax. He also had available a Harper maga-

zine article by Senator Neuberger of Oregon entitled, "Who Shall Pay For Our Roads?", for the writing of which Byoir "research" had been made available, and which will be referred to in detail under the heading "Magazine Activities". Lausche campaigned just fifteen days. According to reports found in Byoir's files, in all but one speech he talked only the ton-mile tax; in every TV program he centered attention on truck taxation; waving copies of the Harper magazine article before the camera; pointing to placards showing the justice of heavy taxes on trucks; displaying Public Utility Commission records of violations by explosive-hauling truckers (the results of a Byoir-inspired investigation) and repeating the results of the Maryland Road Test (a distorted Byoir interpretation) to prove how badly big trucks damage highways. Again, according to Byoir, the data and, in many cases, the words and props were supplied by Stull. The Cleveland Plain Dealer stated categorically "Lausche's astonishing victory, against the political tide, can be construed as an endorsement of his highway program". Stull did his job so well that the truckers were forced to abandon their early charges that the "bills were railroad inspired"—which they were.

[fol. 76] In addition and as part of his program Stull introduced into Ohio the "Save Our Highways Club". This was an organization founded by railroad employees in Tennessee and its entry into Ohio was completely financed by Byoir for which it was reimbursed by the railroads. Literature in profusion was mailed to legislators, granges, farmers' organizations and automobile clubs. All of it was critical of the trucking industry. All of it was calculated to and did bring the trucking industry into public disrepute. Again, a magnificent job was accomplished in keeping any information as to the true position of the railroads in this campaign from the general public. The rise in fees and the campaign for the weight-distance tax in Ohio were two of the outstanding accomplishments of Byoir for the railroads in the entire campaign.

Two other aspects of the Byoir-Stull campaign are worthy of mention. The records of the Byoir organization introduced in this case demonstrate clearly that copies

of Governor Lausche's correspondence with protesting truckers were in the hands of Byoir before the correspondence even reached the United States mails, and to quote Stull, it "contained our poison". This again points out that Kauer and Cohen were working diligently for the interests of the railroads.

While defendants have vigorously argued that the term "poison" was nothing but public relations jargon, I find that Stull meant exactly what he said and in the ordinary context of the words used. It is clearly apparent that the political campaign against the truckers was based on slanted statistics created by Byoir for the railroads and that most of the data used in the speeches, if not the speeches themselves on both sides, Republican and Democratic, stemmed directly from the Byoir organization. While the trucking industry and its members were intellectually certain that this apparent grass-root uprising against the industry was definitely railroad inspired, so well did Stull and Byoir work that it was impossible to document and prove it. The net result was that the trucking industry [fol. 77] faced a hostile public opinion in Ohio because of the method of distortion and overemphasis of the admitted shortcomings of the industry on the part of Byoir. This statement will be amplified in the heading "Vilification Campaign".

## Magazine Activities.

One of the most unusual of Byoir's employees, the head of the Magazine Department, was Patricia Lochridge Hartwell. Mrs. Hartwell, whose professional name while she was with Byoir was Patricia Lochridge, joined the Byoir organization in November of 1949 and was assigned to the ERPC account. She thereupon set out to develop magazine articles which would portray the railroads' point of view and would be unfavorable to the trucking interests. Her method of operation was to interest an editor of a magazine in a story and if the editor thought it had sufficient merit he might assign one of his staff writers or editors to do the piece. In that event Mrs. Hartwell would furnish the writer with the data which Byoir had compiled, which data of course was always slanted against the truckers.

She also made use of free-lance writers. She would interest them in a particular story and pay them while they researched the proposed story at Byoir's or at other places, which amounts in many instances ran into several hundreds of dollars. Since the ultimate aim was to hurt the truckers, any such payments were reimbursed by the railroads, and should the free-lance writer be able to sell the article to a magazine the entire fee went to the writer. In other words, Byoir paid the writer during the preparation of the article and the magazine paid him for writing it. In the extremely limited number of instances that a writer contemplated an article which would be favorable to the railroads' point of view with respect to the truckers, Byoir extended every facility it possessed for use of the writer and at no cost to the writer.

The worth of such a project in the attainment of the ERPC goal cannot be minimized. In addition to the ordi- [fol. 78] nary extensive circulation which the magazines themselves possessed, it was possible, at railroad expense, to circulate reprints of the articles widely to civic organizations, state, city and government officials, as well as to legislators and other individuals who were concerned with public opinion. While it is true that her efforts in every case did not meet with complete success, she was successful in having enough magazine articles released to make an important contribution to the railroads' antitruck campaign. Without attempting to individuate the details of each article, it will be sufficient to recount some of the articles published and Byoir's connection with them.

The first article, "The Giants Wreck Highways" with a subtitle "Heavy Trucks Are Making Their Runs On Your Tax Dollars", appeared in the April, 1950 issue of EVERYBODY'S DIGEST. It was based almost completely upon Byoir's research and development. In the same month Byoir claimed credit for having furnished minor research and comment for an article by Senator Joseph C. O'Mahoney entitled, "What Bad Roads Are Costing Us", which appeared in the April, 1950 issue of the AMERICAN MAGAZINE.

Early in 1950 Mrs. Hartwell presented an outline of a story about truck damage to roads to the editor of HARPER'S magazine. This outline was very extensive and

Harpers evinced interest in it. Thereafter Mrs. Hartwell contacted Myron Stearn, an independent free-lance writer, interested him in the story, furnished him with all the Byoir data on the trucks, and the completed product appeared in the September, 1950 issue of HARPER'S magazine under the caption, "Our Roads Are Going To Pot". At approximately the same time an article entitled, "The Rape Of Our Roads", by Frederick Brownell, a Byoir protege, appeared in the READER'S DIGEST. This article was condensed from a Buffalo Evening News story. These two articles became the first authoritative sources of so-called independent public attacks upon the trucking industry.

[fol. 79] Through the good efforts of Clinton Johnson, Director of Publicity for the Maryland Roads Commission, and a close associate of the Byoir organization, David G. Wittels, an outstanding writer for the Saturday Evening Post, in the September 16th, 1950 issue of that magazine wrote a very critical article entitled, "Are Trucks Destroying Our Highways?" Byoir furnished extensive national research in a five thousand word background memorandum to round out his story on the Maryland State Highway Commission Program. It was the same Clinton Johnson who persuaded Mr. Wittels to go to Maryland and actually research the story in the field; live with the highway crew, meet the highway commissioner, and find out what the problems were for himself. While the article justifiably was critical of a certain class of truckers, it must be realized that the initiative for the article stemmed from railroad-inspired sources and portrayed a particularly venal type of trucker as representative of the entire trucking industry. The distortion, however, was so skillfully done and so subtly written as to make a profound impression upon a casual reader of the article. Again, it is a variation of third-party technique approach, which technique in its application to this case will receive further attention.

Hardy Burke, "a sometime employee of Byoir" and a sometime independent free-lance writer, wrote an article in the April, 1952 issue of the NATIONAL GRANGE MONTHLY entitled, "HISTORY, TRUCKS AND MONEY". This article was actually authored by a Byoir ghost writer, James Miller, and according to Mrs. Hartwell "skillfully developed all

the major points in the ERPC campaign". This article, which pictorially highlighted the collapse of a bridge due to an overladen truck attempting to escape a weighing station on a main highway and the destruction of a detour on a main highway over a country road, was skillfully designed to arouse the farmers in opposition to the trucks.

Again, in the August, 1951, Sunday issue of PARADE magazine, which is a supplement to hundreds of Sunday [fol. 80] newspapers throughout the country, Clinton Johnson assisted Byoir in obtaining the insert of an article entitled, "TRUCKS: HELP OR HEADACHE?" This article completely critical of trucks contained the words and pictures of the Byoir organization.

In the July 30th, 1952 issue of PEOPLE magazine appeared an article entitled, "TRUCKS WRECK YOUR ROADS". This article again critical of the trucking industry was not only "planted" by Byoir but extensive circulation of reprints was made with the article appearing as the lead article on the cover of the reprint whereas the original magazine cover contained no such reference.

An article which represented an extremely important item in the railroads' campaign against the truckers was that which appeared in the April, 1952 issue of the COUNTRY GENTLEMAN. This article by Emilie Hall, described as "YOU CAN HAVE BETTER ROADS" was referred to by the magazine as a "new chapter in the farm roads story". The writer was discovered by Horace Lyon, a Byoir employee assigned to the ERPC account, and Mrs. Hartwell did most of the research and editing for the article, with Jim Miller and Dick Strouse of Byoir helping in some last minute rewrites. Quoting Mrs. Hartwell's appraisal of the publication of this article: "This was a difficult job to put across, entailing two complete rewrites of the article to satisfy both a pixie author and a difficult editor. This was accomplished without too much pain and the underlying philosophy of the ERPC account came through in the final draft." After various complications Lyon and Lochridge were able to get the article endorsed in a box which appeared on the first page of the article by the president of the all-important Association of American State Highway Officials. This article received widespread distribution at

the hands of Byoir but more importantly a motion picture based on this article was made for distribution to farm groups throughout the country. The story of how this motion picture came into existence, the purpose behind the [fol. 81] picture, and the ultimate success of the endeavor is significantly interesting.

For some seventeen years one Fred O. Bailey had served as reporter and farm editor of the United Press Association. During the years 1945, 1946 and 1947 he had served as Legislative Counsel of the National Grange. Subsequent to 1947 he served a number of national magazines in the farm field as a reporter and columnist. According to the testimony of David I. Mackie, one of those magazines served was the Country Gentleman. During the year 1951 Bailey had discussed the formation of a Farm Roads Foundation but nothing came of it during that year. However, the general idea of such a Foundation was to cooperate with and assist farm organizations and farm groups in planning for an adequate balanced roads program to serve their needs. The first and only function of the Farm Roads Foundation up until May of 1953, the date of Mr. Bailey's deposition in this case, was the distribution of a film, "Highways and Byways, U. S. A.", based upon the story in the Country Gentleman magazine, "You Can Have Better Roads". The evidence in this case discloses beyond peradventure of doubt that the moving force in the making of this film was the Western Association of Railroads. Bailey was approached by representatives of that association and offered an outright grant of a picture for distribution. It was not until this offer had been made that the Farm Roads Foundation was incorporated and came into being. The evidence is also crystal clear that Byoir, in conjunction with representatives of the Western Railroads Association, had been working on a script for this picture. In fact, Byoir edited the script. Dudley Pictures of Hollywood were commissioned by the association of railroads to make the picture and the cost of making the picture was divided between the Eastern, Western and Southern railroads on a basis of 18% to the Southern railroads and 41% each to the Eastern and Western railroads. The assessment to the Eastern railroads was $62,500. Based on the

[fol. 82] above percentages of assessment it would appear, therefore, that the cost of the film to the three railroad associations exceeded $150,000. This film, the cost of the public distribution of which (and it was most extensive) has always been borne through a grant by the railroads, was exhibited at the trial of this case and the film and a transcript thereof have been filed of record. The film is professionally and skillfully done. It demonstrates clearly the needs of the farmers for auxiliary roads and suggests united, combined, intelligent community efforts to obtain the necessary funds to bring about this very desirable result. The lasting impression, however, created by the picture is contained in a very few sentences of the dialogue and as the picture concludes; the lasting impact of the film is that big trucks do not pay their fair share of highway construction and maintenance. While extremely expensive it constituted a very important piece of propaganda carrying a terrific impact upon its viewers. Mr. Bailey whose cooperation had been sought in the editing of the script was completely unaware of the very important role played by Byoir. He had no idea of the cost of the film nor of the cost of distribution which was borne by the railroads. The distribution companies were employed to distribute the film through their regular agencies to farm groups and other interested parties. It was distributed free of charge for showing in regular moving picture houses. 186 colored prints were made in 16 millimeter size and 10 black and white 16 millimeter size copies were made for showing on TV. The testimony indicates that considerable use was made of the film on TV. Four 35 millimeter copies were made for showing in regular motion picture theatres. To a viewer of the picture it would appear that the sponsors were the Country Gentleman and the Farm Roads Foundation. No suggestion either in the title, dialogue or screen credits indicated the connection of the railroads with this film. Viewed as it was by millions, [fol. 83] the effect was most certainly to build up prejudice in the public mind against the trucking industry.

The final article which appeared shortly before the institution of this suit was an article, "WHO SHALL PAY FOR OUR ROADS", by The Honorable Richard L. Neuberger.

United States Senator from the State of Oregon. Mr. Neuberger before entering politics was a capable newspaperman and writer. He was also a Legislator in Oregon when the first weight-distance tax on heavy trucks was passed in that state. It would follow naturally that he should be an expert in that field. Hearing that Harper's magazine had discussed the writing of an article in connection with highway financing with the Senator, Mrs. Hartwell telephoned him at his home and discussed the article with him. She suggested that Byoir had splendid material on the national picture and suggested that such material might be useful to him in his article. As a result of this conversation the Byoir material was mailed to Mr. Neuberger in Oregon where he was working on the article. That he availed himself of the material is clear from a reading of the article. Byoir had been pyramiding data, mostly "planted" material, for a period of approximately three years and this was the authoritative material submitted to Mr. Neuberger. His article included generally the same "statistics" as every other article admittedly "planted" by Byoir. Byoir, of course, took no part in the reviewing or editing of the article but the impact of its "help" is clearly discernible throughout.

In commenting upon the above magazine articles it is not intended to convey the impression that the above represented the sum total of the Byoir efforts in the magazine field. They cannot and do not reflect the further extensive efforts of Byoir's Magazine Department and its success in putting over the railroads' point of view in other magazines of lesser importance and circulation. They merely outline the importance of the work of the magazine department in this field, since once articles were published they were ex- [fol. 84] tensively used by Byoir's representatives in selling their antitruck story to persons concerned with public opinion.

## Road Test One—Maryland.

In 1949 the Governors Conference requested the Council of State Governments to study and report upon the matter of reasonable and uniform standards of motor-vehicle maximum-size-and-weight limitations. At the call of Gov-

ernor Lausche of Ohio and cosponsored by highway officials from 14 midwestern and eastern states a conference was held at Columbus, Ohio, on December 5 and 6, 1949, to consider the size and weight problem as a matter of interregional concern. Early in the deliberations of the conference, it became apparent that an objective determination of the effects of *axle loads* of various magnitudes would afford the only possibility of eventual agreement of the entire membership on the important question of axle-load limitations.

The conference formed itself into the Interregional Council on Highway Transportation and appointed a Committee on Test Roads. This special committee met in Baltimore, Maryland, on January 9 and 10, 1950, to inspect a test-road location proposed by representatives of the Maryland State Roads Commission. After visiting the site of the proposed test road, the committee decided that the project identified as Road Test One—Maryland was feasible and recommended that tests be conducted at the joint expense of the participating state highway departments and with Highway Research Board direction of the project. The highway departments of the following states: Connecticut, Delaware, Illinois, Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Virginia, Wisconsin and the District of Columbia, executed contracts with the National Academy of Sciences, of which the Highway Research Board was a component part, agreeing to participate financially in the cooperative venture. The project was administered and supervised by the said Highway Research Board through a small Project Executive Committee and an Advisory Committee. The Advisory Committee included one representative from each participating state, the Bureau of Public Roads, the Automobile Manufacturers Association, the Petroleum Industry, the American Trucking Association, and the Department of the Army. The Bureau of Public Roads provided personnel and instruments for measurements of surface roughness, slab strains and deflections caused by the test loads, soil surveys, and other necessary instrumentation and testing services, and also provided the services of the project engineer and three assistants.

[fol. 85]

The principal object of the test was to determine the relative effects on a particular concrete pavement of four different *axle loadings* on two vehicle types. The loads employed were 18,000 and 22,400 pounds per single axle, and 32,000 and 44,800 pounds per tandem axle. The tests were conducted on a 1.1-mile section of Portland-cement-concrete pavement constructed in 1941 on U. S. 301 approximately 9 miles south of La Plata, Maryland. The pavement consisted of two 12-ft. lanes, each having a 9-7-9 in. cross-section and reinforced with wire mesh. The road at the beginning of the test was in fairly good condition and insofar as the records of the Maryland Road Commission could determine the entire length of the test site was constructed on good granular subbase material.

There were four separate test sections. The first, which was the west lane of the southern half mile of the pavement under test, was subject to 18,000 lbs. single axle load; the second, which was the east lane of the southern half mile, was subject to 22,400 lbs. single axle load; the third, which was the west lane of the northern 0.6 mile, was subject to 32,000 lbs. tandem axle load; and the fourth, which was the east line of the northern 0.6 mile, was subject to 44,800 lbs. tandem axle load.

[fol. 86] The test truck operations began on June 12, 1950, for Sections 1 and 2, single axle loads, and the tandem heavier trucks on the eastern end began operation on June 23, 1950. Operations of all test trucks were continuous, on a 24-hour day, seven-day week basis, except when necessary to interrupt operations for vehicle and pavement maintenance and service, meals and rest stops for drivers, and special tests, such as strain and deflections. In addition, operations were suspended for 24 hours for three holidays during 1950: July 4, Labor Day and Thanksgiving Day. The drivers worked three 8-hour shifts and were allowed a 10-minute rest period each hour and 30-minutes for a meal in the middle of the shift. The 18,000 lb. axle load totaled 111,889 miles; the 22,400 lb. axle load totaled 111,792 miles; the 32,000 lb. tandem axle load totaled 106,008 miles; and the 44,800 lb. tandem axle load totaled 59,256 miles due to cessation of operations during the month of November occasioned by excessive damage to that part of the test highway.

This was to be, and was insofar as the Highway Research Board was concerned, a completely objective test. Mr. Herbert S. Fairbanks, Deputy Commissioner of the Bureau of Public Roads and Chairman of the Highway Research Board, estimated in his testimony in this case that the stress placed on the road during the pendency of this test would approximate 40 years of normal usage of the same road. Contrary to the general understanding of the content of the subsoil of the road, it became very evident as the test progressed that certain portions of the road, particularly that over which the heavier trucks ran, had a subgrade which consisted in great part of fine grain soil. When water permeated the fine grain soil the deflection caused by the weight of the trucks would push the water and solid matter from the subbase of the road and eventually this would create a hole or pocket under the road. The weight of the truck would then crack the concrete immediately over the hole or pocket. The water which [fol. 87] would lodge in these pockets or holes would be "pumped" up through the expansion joints of the road. While test procedures might have allowed normal maintenance of the roads, such as filling in and reinforcing these cavities under the road, deliberately and in the interest of scientific knowledge minimal maintenance was indulged in throughout the entire period of the test. Naturally this resulted in much faster deterioration than would be the case had normal maintenance been carried out.

It will be recognized that the impetus for this test came from Governor Lausche of Ohio. His Director of the Ohio Department of Highways, T. J. Kauer, Chairman of the Interregional Council on Highway Transportation, as such, had extremely close contacts with all features of the test. It will also be recalled that Harold Cohen, Chief of Public Relations of the Ohio Department of Highways, was a very close associate of Stull, Byoir's representative in Ohio. The purpose of this test was a scientific determination of what a road of this character could carry safely. The distortion of this aim and purpose, and the peculiar conduct of Messrs. Kauer, Cohen and Clinton Johnson, Director of Publicity for the Maryland Roads Commission, makes an interesting chapter in the Byoir-railroad antitruck cam-

paign. It was the purpose of Byoir to obtain as early as possible any information from this test which would support their theory that the *gross weight* of the truck (whereas the test was an examination of the effects of *axle load weights*) was alone responsible for breaking up roads. With this in mind close liaison was kept with Kaier, Cohen and Johnson. The records of the Byoir organization show that Johnson during the course of this test was a frequent visitor at the Byoir offices in New York and that the expense of his visits were borne by Byoir and reimbursed by the railroads. There also appear in the evidence many vouchers which indicate that the railroads reimbursed Byoir for entertainment of Johnson and his wife. Ultimately he became an employee of the ERPC, receiving [fol. 88] $1,000 per month plus expenses from December of 1952 through September of 1953. A further inference may be drawn from the fact that in an undated memorandum (P-121) from Hardy, Byoir's New Jersey and Pennsylvania agent, to Mr. Deegan, Hardy noted that in checking over the agenda of an ERPC meeting it occurred to him that Deegan might not want to discuss Johnson at the open meeting. He further mentioned that he talked to Littlefield about this and that he was interested in Deegan's idea. Hardy's explanation that the reason they might not want to discuss Johnson at the open meeting was because it was a mere matter of slight detail does not satisfy the Court (R. 745). While out-and-out bribery of Mr. Johnson has not been proven by a preponderance of evidence, the Court is satisfied that the plaintiffs have proved that Mr. Johnson because of the above-mentioned factors was not an objective public employee, but rather was working for the interests of the railroads in order to further his own personal goal of obtaining a lucrative position with the ERPC.

There is no doubt and the record abundantly proves that Byoir actually did get information about the test as it progressed. It was the purpose of Mr. Fairbanks and his associates that no conclusion be published until the full committee had time for a mature consideration of all of the factors involved in the test. From time to time, however, Byoir put out releases which indicated that big trucks, in the sense of gross weights rather than axle loads, were the

primary factor in destroying the roads and highways of this country. Byoir even released pictures terming the Maryland Road Test as a "Crackathon"; pictures which showed the pumping action when heavy trucks ran over joints where the subsoil was of fine grain sand rather than the granular subsurface which withstood the test of all of the weights with remarkable durability. If a "Crackathon" is a highly technical and scientifically controlled attempt to crowd into a period of several months the effect of roughly four decades of road use in order to determine what factors ultimately result in the break up of roads, Byoir used the proper appellation in describing the Maryland Road Test. But this Court finds that Byoir meant, and the reading public so interpreted it as meaning, that a "Crackathon" was the result which invariably followed from the use of heavy trucks on concrete roads. In a word—big trucks are the sole procuring cause of road destruction, rather than the true nature of the test which was to crack the road under controlled conditions.

[fol. 89]

Mrs. Hartwell likewise entered into this picture. She spent about a week at the site of the test, taking notes and watching the progress of the test, and did her best to get releases which would favor the railroads. She also sent a woman free-lance writer to the scene with instructions to represent herself as an editor of Colliers, which she was not. As such purported editor she was well received by all at the site including representatives of the American Trucking Association and she was accorded every courtesy possible. Her report to Mrs. Hartwell is a masterpiece of the venomous approach which anyone connected with Byoir took toward the heavy trucks.

One particular feature of the test and Byoir's approach to it deserves special mention. A running motion picture of the test at selected times was made for the Bureau of Public Roads. At the conclusion of the test and with the approval of Mr. Fairbanks, this motion picture was edited and narrated by a competent Washington, D. C. news commentator. The original so-called "long version" of the motion picture was shown at the trial of the case and the Court was impressed with the completely objective approach to the problem and the fair comments of the nar-

rator. Viewing the motion picture at the end of one day's session, the Court felt that the picture clearly demonstrated that the most important cause of cracking of concrete highways was the presence of a fine grain silty or clay soil subgrade. One important statement was made in the long version of the film:

> [fol. 90] "The test shows conclusively that a concrete pavement, of the strength and dimensions of the test road, will support indefinitely, without structural failure, single-axle loads as great as 22,400 pounds—*if* there is a subgrade, of adequate thickness, of non-plastic, granular soil. The equivalent of such support must be supplied by the design of the roads *in the future.*"

Among others, this important statement was carefully removed from the later shortened version of the film.

The film was in three parts. The first part showed pictures at the actual site with the narrator explaining methods of operation, the purpose, and some of the results. The second part was devoted almost entirely to a precise engineering explanation of the test and its purpose, illustrated by model trucks and drawings. The third part was the conclusion in which the narrator summarized the test, its purpose, and results. It was at this point that Byoir directly entered the scene. One of the Byoir representatives in Washington called upon Mr. Fairbanks and told him that the Byoir organization representing the railroads would like to have a copy of the film for distribution and showing to selected groups. Mr. Fairbanks demurred at the suggestion of Byoir that a shortened version of the film would be adequate to show the purpose and results of the test. Under considerable pressing by Byoir, Mr. Fairbanks said he would consider a shortened version of the film, if it could be demonstrated to him that it did not distort in any way the purpose of the test and the results obtained therefrom. Byoir then suggested that certain portions of the film be shown consisting of the first part of the film and the last part of the narrator's summary. The shortened version of the film was thereafter shown to Mr. Fairbanks and his associates and after one viewing

Fairbanks approved the release of the shortened version of the film to Byoir for the railroads. It was only when Mr. Fairbanks received a proposed brochure from Mackie, [fol. 91] representing the railroads, which brochure was intended to be sent out with the film, that he realized there might be possible distortion. His statement in a letter dated April 3, 1953 to Mr. Mackie makes that extremely clear:

> "However, we do not regard the film as an indictment of large or even heavy trucks *per se;* and certainly, it would be foreign to our purpose were the film in any way to become an instrument of partisan attack upon highway transportation or the trucking industry."

In addition, he suggested that the Bureau of Public Roads should not appear as the sponsor of the picture, if such use was intended to be made of it. Mackie thereupon agreed not to distribute it with the brochure and asked permission to exhibit the shortened version of the film already purchased by Byoir on behalf of the railroads. Since Mr. Fairbanks was honestly of the opinion at that time that the film did not distort the purpose and the results of the test he agreed that they might retain the copies and exhibit them.

As stated above, the long version of the film was exhibited on one of the trial days. On the next day the shortened version of the film was exhibited. The profound impact on the Court of the short film was that big trucks per se were the sole cause of damage to the highways. Important language which would have made clear the results of the test, particularly with respect to bad subgrade soil and pumping, were entirely eliminated. The impression left with the Court at the conclusion of the short film disagreed entirely with the sworn statements of Mr. Fairbanks regarding the results of the test. His statements agreed with those made in the long version of the film as previously set forth. That the distortion was intentional as well as effective is clearly evident from an overall reading of this record. Mr. Fairbanks viewed the exhibition of both films in the courtroom. On the basis of his sworn testimony the Court finds that Mr. Fairbanks was fooled by Byoir and [fol. 92] tricked into approving a distorted film. This par-

ticular episode in the Byoir-railroad antitruck campaign is a classic example of the "use" of public officials by the Byoir organization in furtherance of its campaign. Such was an everyday occurrence in the Byoir approach to public officials in this case, and I have particular reference to the above situation as well as the "use" of Governor Lausche and Messrs. Taft, Manning, Dimit and Schmidt; the latter two being referred to under "Pennsylvania Activities". On the other hand, any "use" of individuals such as Clinton Johnson, Menzie, Kauer, Cohen and "Cappy" Thompson (of Pennsylvania) was with their complete knowledge and for the purpose of advancing their own personal interests rather than those of the public that they represented. These and other instances will be referred to in more detail in other headings of this opinion. It is only fair to Mr. Fairbanks at this point to say that the Court considered him a fine, honorable and dedicated public servant, who in giving permission for the shortened version of the film never contemplated that it would be used for the very purpose which he decried in his letter of April 3, 1953 as "an instrument of partisan attack upon highway transportation or the trucking industry".

Needless to say, Byoir made full use of its publicity outlets to tell the world that big trucks crack roads. It was a complete distortion not only of the test but of Mr. Fairbanks' opinion that the road tested could carry gross weights without danger as high as 73,280 pounds (R. 3318).

On or about January 8 of 1951 there was distributed to the members of the Advisory Committee a proposed copy of the findings or in other words the tentative committee report of Road Test One—Maryland. Kauer's copy was in the hands of Byoir within a remarkably short time after its receipt by him despite the Advisory Board's decision that the data was not to be issued to the general public at that time. Byoir summarized the tentative findings and gave them to News Week, where they appeared [fol. 93] as completed studies, although the final report was not approved until May of 1951 and the printed copies not available until sometime after October of 1951 (R. 3322-3326). The results as given to News Week and printed in a box in that magazine completely distorted the purpose and

results of the test and attributed all road damage to big trucks, the position taken by Byoir from the outset and entirely false insofar as the objective findings of the test are concerned.

It might be well at this point to set out what the actual conclusions of the officials in charge of the test were as officially reported in Publication 227 of the National Research Council. There were 19 technical findings which are carefully set out in technical engineering language. Briefly stated with respect to the point under discussion in this case that big trucks break roads, they are as follows: (1) That where the road was built on granular soil very little damage occurred no matter what type of vehicle was used; (2) That where the test road was built on fine grain soil, there was no damage until the fine grain soil became permeated with water; (3) That in the presence of water, the subsoil was pumped from under the concrete slab through joints in the road; (4) That the degree of pumping was faster and the amount greater upon the application of the heavier vehicles; (5) That with the subsoil removed the concrete would and did crack, with the heavier vehicles doing the greater and quicker damage.

As publicized by Byoir, both in its releases and in the shortened version of the film, one conclusion was bound to be reached by the ordinary observer from the reading of the releases or viewing of the short film—that only big trucks did damage to the highways and that without regard to any other contributing factor.

## Pennsylvania Activities.

As stated at the outset of this opinion, after 1943 the attempts of the trucking industry to increase axle loads and [fol. 94] gross weights in the legislative sessions of 1945 and 1947 failed. In the 1949 session the then Governor, James A. Duff, ordered the Chairman of the Legislative Committee on Highways not to send any bill to his desk increasing the said weights. With complete administrative support the railroads had no difficulty in controlling the restrictions on trucks and by legally acceptable means.

Pennsylvania had a lower gross weight than all of its surrounding states and the net result was that many of the

trucks could not legally carry through Pennsylvania loads which would be legal in other states. One incongruity of that situation was that at the western end of the state in shipments from steel mills only the first 60 miles of a trip to surrounding states of many hundreds of miles was off limits for a full load. Naturally it created a considerable problem for the truckers engaged in the long-haul steel industry. That the situation was favorable to the railroads was fully recognized and every attempt was made on behalf of the railroads to keep that weight limitation by statute, and of course for the express purpose of helping railroad revenues. Again, this was entirely proper. The situation was such that in 1949 Pennsylvania did not need the services of Byoir. William A. Reiter, Chairman of the Associated Railroads of Pennsylvania, had a good working team operating in Harrisburg. Joab K. Mahood, Secretary of the Grange, together with H. A. Thomson, better known as "Cappy" Thomson, Secretary of the Pennsylvania State Association of Township Supervisors, worked in close cooperation with Mr. Reiter. However, improper activities were also present. That the Pennsylvania Railroad used the Byoir third-party technique in creating ill will against the trucks when House Bill 560, The Big Truck Bill of 1949, was pending, is clear from two advertisements printed during the months of March and April of 1949. While it is true that one advertisement designated as 3P-5192 was put out under the Associated Railroads of Pennsylvania, two advertisements designated 3P-5205, "You Can't Satisfy A Road Hog", showing a big truck in the form of a hog at a [fol. 95] large trough marked House Bill 560, and 3P-5203, "Mr. Taxpayer and Motorist We've Had Enough . . . Haven't You?", were put out under the name of the Pennsylvania State Association of Township Supervisors, H. A. Thomson, Secretary. The advertisement 3P 5202, Road Hog, appeared in one hundred and thirty-five Pennsylvania newspapers, while advertisement 3P-5203, Mr. Taxpayer, was limited to the newspapers of the larger cities of Pennsylvania. The Pennsylvania State Association of Township Supervisors is created by statute. Public monies are appropriated for its support and it would be impossible for that association under statutory budgetary requirements to use public money to pay for advertisements of this sort.

Mr. Reiter's naive explanation was that Mr. Thomson wanted to run the advertisements and that he had Al Paul Lefton, P. R. R.'s advertising agency, prepare them for the association, had them inserted in the respective newspapers, and did not discuss the payment of the charges until sometime thereafter; then, out of the goodness of his heart and so as not to embarrass Mr. Thomson, he persuaded the railroad to pay the charges of preparing the ads and inserting them in the newspapers. That explanation the Court does not accept. To the contrary it finds that they were prepared with prior financial and academic approval of the same Mr. Reiter. These advertisements were in line with the Byoir technique designed to vilify the trucking industry as such.

It is apparent from the record made in this case that Mr. Mahood and Mr. Thomson were both members of Mr. Reiter's team in opposition to any increase in truck sizes or weights. They had worked together for a good many years and had worked well together. However, in 1951 after the introduction of The Big Truck Bill in May of that year in the Legislature, it became evident to all three that Senate Bill 615 had a good chance of passing and being signed by the Governor of the State, then the Honorable John S. Fine. At a dinner-meeting, paid for by Reiter, it was decided to call upon the services of a publicity agent to [fol. 96] help them in their campaign against the bill. Reiter went to Littlefield and as a result of that conference, the Carl Byoir organization was called upon to move into Pennsylvania in the fight against The Big Truck Bill. With almost three years of experience in this particular field behind it, Byoir through Colburn C. Hardy, assisted at times by Kiely, Marine and Stull, immediately started its third-party technique operations. It was not necessary in Pennsylvania to set up bogus organizations. As aforesaid, Reiter had working closely with him the Secretary of the Pennsylvania Society of Professional Engineers, the Pennsylvania Grange, and the Pennsylvania State Association of Township Supervisors. These three organizations, but principally the latter two, were the springboards for the publicity in Pennsylvania. The state was divided into sections: Stull in the western, Hardy in the central, and

Marine in the northeast. Every editor of every newspaper was contacted and personally wherever possible. The Byoir "kit", a composite of all statistical information created by Byoir, was made available to these editors. Release after release denouncing S. B. 615 was given to the newspapers. It was also at this time that it appeared Mr. Mahood would retire as Secretary of the Pennsylvania Grange to be succeeded by Dr. B. H. Dimit, who was retiring from the profession of teaching at one of the State Teachers Colleges. Investigation by Reiter, et al. showed that one of his close personal friends and associates was Robert K. Fisher, an attorney on retainer by the New York Central lines. Their first connection with Dr. Dimit was through Mr. Fisher, and through Fisher the Byoir "kit" was made available to Dimit. Dr. Dimit was an ideal associate to have join the team since the considered opinion of the "team" was that Dr. Dimit was a person who would be very glad to have someone else do his research for him. From that time Dr. Dimit was putty in the hands of Byoir. Completely unknown to him Byoir so manipulated him that no speech, letter, or news release was delivered, sent out, or released until it had been carefully edited by Byoir and in at least [fol. 97] one instance cleared with Mr. Littlefield of the Pennsylvania Railroad.

Hardy took up his quarters in the office of the Grange, used Grange stationery, and the bills for publicity were sent to the Pennsylvania Grange c/o Mr. Hardy. The caption of the bills clearly indicates that the printing houses and newspaper services regarded Hardy as a member of the Grange. Hardy also had an address attacking the bill made over a Lancaster Broadcasting System station under the name Pennsylvania State Association of Township Supervisors. Although the station must have known, since Byoir was billed for the broadcast, that it was made under the auspices of at least Byoir and not the association, nevertheless, and in violation of the Federal Communications Act, no mention was made at the conclusion of the broadcast that it was being paid for by an independent organization. This bill as well as the other bills above referred to were paid in the first instance by Byoir and all reimbursed by the ERPC.

The Trucking Bill had hard sledding due to this organized opposition. However, on the agenda of the Legislature was another bill that caused tremendous difficulty—The Pennsylvania Sales Tax Bill. Controversy over this kept the Legislature in session until the end of the year. Despite the terrific resistance created by Byoir and its third-party technique as well as the opposition of the railroads, the bill passed by a resounding majority of each House and was sent to the Governor. Exhibit P-53 contained in a memorandum of Reynolds Girdler, the account executive of ERPC, dated February 15, 1952, to John Stahr, summarized Byoir's accomplishments from Byoir's viewpoint in helping to bring about the ultimate veto of the bill. It is well worth repeating it at this point in toto:

To: John Stahr

From Reynolds Girdler February 15, 1952.

Nomination for December Award.

Achievement: Defeat of "Big Truck" Bill in Pennsylvania.

[fol. 98] The state of Pennsylvania has one of the lowest gross road limits for heavy trucks in the East. Specifically, Pennsylvania will not permit any truck on its highways which weighs more than 50,000 pounds with load, as compared with 73,000 pounds allowed by New York, New Jersey, and most other Eastern states.

This low maximum in Pennsylvania is very irksome to the heavy trucking industry because it keeps them from getting a large share of the very profitable steel hauling business between major cities in Pennsylvania and Ohio.

Consequently, the trucking industry started back in the middle of 1950 to lay the groundwork for a piece of legislation which would increase the Pennsylvania maximum from 50,000 to 60,000 pounds. The trucking industry bought an elaborate system of television and radio programs blanketing Pennsylvania. They went through the major cities of Pennsylvania and worked out promotional special trucking sections with all the important newspapers, thus giving each important newspaper very substantial and profitable ad-

vertising. In addition, the trucking industry smartly inveigled the Pennsylvania Railroad into a discussion of their agreeing on an increase in the allowable maximum, and the Pennsylvania Railroad very stupidly agreed not to oppose an increase up to 50,000 pounds. This agreement was thoroughly publicized throughout the political world of Pennsylvania.

The trucking industry went further. It got up a committee and $200,000 for the campaign for the Republican candidate for governor, and he was elected. The trucking industry also heavily subsidized various members of the Pennsylvania legislature during the November, 1950, election.

When January, 1951, opened there seemed every reason to believe that the truckers would get their bill through, increasing the allowable weight to 60,000 pounds.

The 17 railroads of Pennsylvania then started fighting —without our help. They fought the bill for four months, [fol. 99] and then threw up the sponge. They reported to their superiors that they were licked. Even so, the lobbyists in control of the railroad activity continued to oppose allowing the C. B. & A. people to operate in Pennsylvania.

Their superiors then thrust us down their throats.

The team went to work in Pennsylvania beginning in June, 1951. Not only did they begin to generate publicity against the bill, but they were successful in getting a long list of organizations and individuals publicly to oppose the bill. Those organizations ranged from the CIO to the Pennsylvania State Grange. The individuals ranged from a "crusading coroner" of Pittsburgh to John L. Lewis. The clamor against the bill grew and grew. Even so, the Republican majority in the Pennsylvania Legislature was so thoroughly committed to the trucking industry that the bill finally went through both the lower and upper houses. However, so violent was the fight that it kept the Pennsylvania legislators in session for nine months—a record in Pennsylvania.

Even after the bill was passed by both houses, the clamor against the bill continued. Day by day went by without the Governor's signing the bill. Finally, he announced that the opposition was so great that he would

have to hold a public hearing. He scheduled the public hearing to be held in his own chambers.

The C. B. & A. team thereupon went out and organized 21 witnesses for 21 organizations against the bill. They prepared their statements and the publicity together with it.

The public hearing was one of the biggest news events in Pennsylvania. Major Pennsylvania newspapers placed the eight-column streamers front page, over national and international news involving Truman and Churchill. Six minutes before the bill automatically would become law in the absence of a Governor veto, Governor Fine vetoed the bill.

The repercussions on the trucking industry were nation-wide, and embittered comments went into newspapers all [fol. 100] over the country. In Ohio the truckers were so stupid as to state publicly that "All the ATA money didn't do (them) any good." They went on to say that they thought they had the bill bought.

Veto of this bill meant that some $5,000,000 worth of freight was retained on the Pennsylvania Railroad, because the trucking limit was not raised.

This represented one of the most dramatic illustrations of the power of organized public opinion that anybody could hope to find. While the award must go to Colburn Hardy as head of the team, he must share the award with Lyon, Stull, Marine and Kiely, because it was a team job.

I attach as evidence copy of the letter written by the top railroad lobbyist, who originally fought hardest to keep us from being allowed to operate in Pennsylvania. I don't think anybody in the history of Byoir ever received a more impressive tribute.

Reynolds Girdler

RG/et
Enc.

While the record in this case clearly discloses that some of the statements constituted "puffing", Hardy himself admitted on cross-examination that the veto was his greatest accomplishment in the public relations field up until that time and that it constituted "his finest hour". However, the record and the Governor's veto message also

clearly indicate that Byoir was extremely effective and that its organized opposition had much to do with the Governor's veto. And how was that accomplished over and above the use of the third-party technique?

To begin with Pennsylvania was one of the constituent states of the Maryland Road Test. The Governor's veto, P-282, was dated January 21, 1952. It will be recalled that the first tentative draft of the Maryland Road Test Report was to have been issued on January 15th of 1951. Byoir had obtained advance copies and had publicized the railroad theory that big trucks alone break roads. The final draft [fok 101] was not printed and distributed until 1952. The State Highway Department of Pennsylvania through the Secretary of Highways was against the bill. One of the reasons that the Chief Engineer was against the bill and urged the Governor to veto it was based upon statistics drafted by his own department. An objective analysis of the statistics presented, however, finds that they came in the first instance from the desk space organization created by Byoir in New York, the Empire State Transport League. In the second place one Mr. Marine, the same Mr. Marine of Byoir, a statistician of great merit in presenting trucking statistics in such a way as to damn the trucking industry, was the chief source to Mr. Van Riper, Assistant Chief Engineer of the Pennsylvania Highway Department, of the trucking statistics upon which Mr. Schmidt, then secretary, relied in urging the veto to Governor Fine. It will be seen that there was here, as there was in the United States Bureau of Public Roads, considerably less than complete objectivity in the presentation of facts to public officials, upon which facts public officials were urged and did exercise executive judgment favorable to the railroads and injurious to the truckers.

In addition to the above, Byoir, at the request of Reiter, wrote speeches for legislators in opposition to the bill. Hardy also prepared all of the press releases of Dimit and Thomson when they appeared at the Governor's open public hearing on the bill. These releases, skillfully drawn, stressed those elements chosen by Byoir and the railroads for particular attack.

There is no doubt that Dr. Dimit admitted on the stand that he had, without his knowledge, been "used" by the Byoir organization. The effect of the testimony of "Cappy" Thomson on cross-examination, even though he attempted to vehemently deny the fact, was that he too had been "used" by the Byoir organization. From his appearance, manner and testimony, the Court was persuaded that Mr. [fol. 102] Thomson knew he was being used by the Byoir organization and was perfectly happy in that status.

Having successfully repulsed the truckers in their efforts to clear Pennsylvania as a bridge state, for the next year and up until the institution of this suit the record is abundantly clear that Byoir worked hand-in-hand with Littlefield and with Reiter to promote the introduction and passage of a weight-distance tax, using exactly the same methods that had been used in the other states of the program. While there is no direct testimony on that subject, it is the opinion of the Court that it was the institution of the present suit which prevented further action along that particular line of attack. However, up to a few days before the institution of this suit, extensive plans were being made for Byoir to again enter Pennsylvania and to push its campaign with the utmost vigor and backed by whatever funds were necessary. It may be remarked at this point that neither Byoir nor the railroads were ever short on funds in this campaign.

## Campaign of Vilification.

The whole tenor of the antitruck campaign, originated by the railroads in the thirties, abandoned during the war, and thereafter reactivated in 1946, was based upon the use of third parties to "front" for the railroads. As noted, in New Jersey, the New Jersey Automobile Owners, Inc. and the New Jersey Tax Study Foundation were two shining examples. In New York, the Citizens Tax League and the Empire State Transport League are two further examples. In Ohio, Save Our Highways Clubs were used.

In Pennsylvania, the good offices of the State Grange and the State Association of Township Supervisors were exploited. The above examples are quoted to demonstrate that Byoir merely accentuated and accelerated the campaign

of the railroads by forming bogus front organizations and perfecting the use of existing ones. The base of the pyra- [fol. 103] mid of accomplishment on the part of Byoir for the railroads was the arousing of resentment in the ordinary citizen against the trucks. To this end Byoir shrewdly chose the obvious shortcomings of the trucking industry and by use of dramatic segments of truth distorted them into complete falsehoods. While Byoir chose the appellation of "third-party technique" for its activities, I prefer to treat the whole procedure in its true light, which is the technique of the "Big Lie".

How was public resentment aroused during the period 1949 to 1952? Byoir as early as 1949 had started a collection of photographs of sensational truck accidents. Immediately upon the happening of such an accident, no matter in what part of the country, Byoir would find some person not averse to publicity to issue a news release and use the picture as representative of usual day-by-day traffic events rather than the unusual, which it was. In some few instances trucks carrying weight far beyond the loaded capacity of a bridge would attempt to cross, would fall through and actually destroy the bridge. While these were few in number, Byoir saw to it that these few were so publicized as to create the impression that it was a matter of great frequency, if not of daily occurrence. Byoir also highlighted the obvious shortcomings of the truck, which were slow speeds on steep mountainous grades causing traffic tie-ups; the racing of the truck down the opposite grade thereby preventing the unblocking of the tie-ups; the obstruction of the vision of the motorists following large trucks; the "gunning" of the motors of the trucks in residential areas, and other actions of some drivers in order to bring all truck drivers into disrepute. The breaking down of secondary and country roads by the use of large trucks was highlighted pictorially throughout the country and to the point where the casual motorist was convinced that a tremendous percentage of our secondary roads were being broken down and absolutely destroyed [fol. 104] by heavy trucks as pictorially represented. While it is true that on occasion some venal truckers did use back roads to escape weighing stations on main roads, in a vast

majority of the instances, represented as typical, the damages resulted from detouring by State Officials of heavy trucks over roads not capable of carrying the weight and solely for the purpose of making repairs on main highways fully capable of bearing or carrying the weight of the trucks in question. All of these publicity releases, pictures, etc. were furnished by Byoir to all the civic organizations previously mentioned. In addition, and ostensibly as an independent news source, Byoir utilized wholly owned subsidiary corporations which made newspaper mats of a group of pictures which were distributed at nominal cost to thousands of newspapers throughout the country. These newspapers were primarily in the smaller communities and, of course, they could not afford that type of photographic coverage. And what were these photographs so furnished?

Reproductions of a few typical instances were exhibited at the trial: From Byoir's Central States News View in Chicago came sex, sports and a truck breaking up a road. First, a picture of a plunging neckline; next a picture of the new Notre Dame basketball coach (side by side at the top of the mat). On the bottom half of the mat was a truck "bogged down" breaking up a road.

Again, another Central States News Views showed at the top of the mat Joe Lewis, Jr., 2½, being given a boxing lesson by his famous father, retired heavyweight champion at that time. Next, "Miss Continuous Towel of 1949", a shapely model honored by linen-supply industry. In the lower half of the picture was a truck and a broken up highway caused by heavy trucks on detour.

Finally, People, Sports In The News, a New York subsidiary of Byoir sent out for immediate release, exclusive in a particular city, a 2 column, 13 EM mat, showing royalty, sports and trucks. The top of the mat on one side showed [fol. 105] the then Queen Elizabeth of England on her 50th birthday. On the other top side is shown a recalcitrant race horse in the starting gate at Detroit's Hazel Park track. Finally at the bottom of the mat appears a picture of the Maryland Road Test showing engineers measuring deflections at a joint and termed in the mat picture "Crackathon" —"Scientific tests to measure road damage inflicted by heavy trucks are under way on this mile-stretch of highway

in Maryland sponsored by 11 states alarmed over road deterioration". In the light of what has been said before about the Maryland Road Test this amounts to almost complete distortion.

Another very effective method of inflaming a large segment of the public which always has been influential in the formation of public opinion was to put on the Byoir payroll for purely propaganda purposes Mrs. Bessie Q. Mott, Vice-Chairman of the New York State Federation of Women's Clubs and Chairman of the Public Affairs Department of that same group. Mrs. Mott, described as "a typical American clubwoman", made quite a profitable career out of being the typical American clubwoman. In addition to receiving a sum substantially in excess of $13,000 (reimbursed by ERPC) over a relatively short period of time, she was successful in infiltrating into the programs of most of the important women's groups in New York and New Jersey, programs arranged by Byoir, which included speakers furnished by Byoir, for the purpose of arousing resentment against the truckers. It was necessary to make Mrs. Mott an expert in that field so Byoir made her an author. Byoir wrote a pamphlet entitled, "ARE WE BEING RAILROADED INTO SOCIALISM?" "A Survey of what's wrong with national transportation policy and how it affects each of us." A foreword was written by Charles L. Bergmann, Chairman of the Railroad Securities Committee, Investment Bankers Association of America. This brochure contained all of the favorable aspects of the railroad story and damned the truckers. While no witness of Byoir at [fol. 106] the trial definitely would concede that the entire publication was Byoir's handiwork, and not Mrs. Mott's, the purported author, there is no doubt in the mind of the Court that Byoir conceived and executed the entire transaction. Mrs. Mott was not new in the propaganda field. Byoir had occasion in the past to use her expensive services in the same field of propaganda in the A & P situation, which will be discussed *infra*.

By the use of these various media of arousing public resentment, including newspapers, magazines, radio broadcasts and television, Byoir in the area of its operation built a strong base of public resentment. During this period

they created so great public resentment against the trucks that it was then a relatively simple problem for Byoir in the public relations field to sell their "poison" against the truckers, and by the use of already existing organizations friendly to the railroad story, and by reactivating and setting up other organizations, as already noted, to convince people and legislators that everything the trucks did was wrong and that any restriction suggested should be placed upon them.

The cap of the pyramid, of course, was the projected legislation and the cap of the pyramid differed in each state. In New Jersey it was increased license fees lowering of weights. In New York it was the weight-distance tax. In Ohio it was first a substantial increase in license fees and next the campaign for the weight-distance tax. In Pennsylvania it was the veto by Governor Fine of the so-called Big Truck Bill to be immediately followed by a campaign for the weight-distance tax.

Counsel for all defendants have argued strenuously that since everything done was geared to ultimate legislation, then anything done to accomplish that end was within the protection of the 1st Amendment to the Constitution of the United States and without the orbit of the Sherman and Clayton Antitrust statutes. But this was more than merely an attempt to obtain legislation. *It was the purpose* [fol. 107] *and intent* of Messrs. Deegan, Littlefield and Mackie on the one side, and Byoir on the other, *to hurt the truckers in every way possible even though they secured no legislation; it was their purpose to restrict the activities of the truckers* in the long-haul industry *to the greatest extent possible*, and finally, if possible, *to drive them out of that segment of the entire transportation industry*. This feature of the action, which must always be carried in mind and represents the considered finding of the Court in this case, will be discussed at greater length in the legal discussion to follow. However, this particular section of the opinion is of great importance in the overall consideration of the case since it constitutes the original basis of activity of Byoir and the railroads against the trucking industry.

## The Counterclaims.

A review of the evidence presented in this case by which the defendants attempted to establish a conspiracy on the part of the truckers to monopolize the long-haul transportation industry in the northeastern part of the United States reveals consistent and persistent activities on the part of the truckers which in many respects parallel the activities of the railroads in the field. It is the contention of the railroads on the basis of that testimony that if, in the opinion of the Court, an illegal conspiracy on the part of the truckers has not been established, the evidence of the truckers' activities as presented in the defendants' testimony shows a course of conduct which justified every activity of the railroads as reasonable competition in a free enterprise competitive system.

There is no doubt that between 1936 and 1954 there was a marked increase in the use of heavy trucks in the northeastern section of the United States and in the distances traveled by said trucks. While railroad revenues increased to some extent, the percentage increase did not approach the percentage increase of the revenues of the [fol. 108] heavy trucks. Although in the northeastern part of the United States and in the country as a whole the percentage of the total production transported by railroad increased moderately, that of the trucks increased very appreciably. When it is considered that trucks receive about 6¢ for each ton mile carried by them, where the railroads receive 1.4¢ per each ton mile, the disparity in cost to shippers will appear in a more vivid background. The truckers contend that their fast services and flexibility, despite their higher charges have been the principal factors in the increase of their business. The railroads insist that public subsidy in the building of roads is the answer.

There is no doubt that since 1943 PMTA has actively sought to attain legislative objectives through a broad-scale public relations program. Actually since 1941 it has employed public relations personnel which later developed into a public relations department under the guidance of a competent public relations director. Part of plaintiffs' program was to establish close liaison with members of the Pennsylvania Legislature in order to achieve PMTA's

objectives. It encouraged its members to take an active part in party politics to aid in obtaining or defeating legislation. Originally most of its activities were directed at the county level and political contributions were sought and delivered to the respective parties at that level. There is no doubt that PMTA was at all times through its officers, committees and public relations director, fully aware of the continuing railroad campaign, particularly in Pennsylvania, to convince the public that the heavy truckers did not pay their proportionate share for road building and road maintenance. The contentions of the railroads throughout this case was that the truckers have enjoyed the aforementioned public subsidy. The railroad campaign through newspapers, magazines and speeches since the 1930's has been directed at "educating" the public that the railroads paid taxes on everything that they used in the transportation of freight and passengers including stations, freight [fol. 109] yards, etc. Parenthetically it may be here remarked that the railroads enjoy under the laws of Pennsylvania certain advantages not accorded truckers, such as, rights-of-condemnation and freedom from local taxation on rights-of-way; it is also a matter of common knowledge that railroads in earlier years received many subsidies at the hands of the public through the State and National Legislatures in the form of land grants and otherwise. It should also be observed at this point that initially roads were not built for trucks. They were and still are important in our scheme of national development, national safety and security, as well as benefiting the driving public. Roads were already in existence when the trucking industry was born. It may also be remarked that there has never been a declared national policy or a state policy as advocated by the highway users association based on the recommendations contained in the Atterbury-Swayne Report. That report, it will be remembered, recommended that all costs for the construction of highways, over and above that necessary to carry the weight of the passenger car and the small pickup truck, should be assessed against the heavier vehicles which made use of the roads by assessment against them of user taxes. However, the matter of weight and sizes, as aforesaid, was left to the respective states, primarily at the

insistence of the railroads. And up to 1955 upon the passage of the latest truck bill in Pennsylvania, the railroads were completely successful in Pennsylvania in eliminating a considerable amount of truck competition. It must also be borne in mind at this time that the railroads had interpreted the National Transportation Policy of the Congress of the United States to their own advantage, i.e., airlines for speed; trucks for short-haul, and railroads for long-haul. As interpreted, this has never been and is not now the National Transportation Policy. It must also be borne in mind that the counterclaims are based on events that occurred in Pennsylvania. The record is bare of any activities on the part of the truckers in any of the other [fol. 110] states resisting the railroad activities. Apparently the truckers of Pennsylvania were the only ones who actively resisted and did something about the railroad-Byoir campaign.

With the above factors in mind, it will be seen that through the decade of 1940 to 1950 there was a distinct clash between the railroads and the truckers in the State of Pennsylvania over any legislation which would be favorable to the truckers. That the truckers and PMTA attempted to do everything possible to attain their legislative objectives and aims is amply established by this record. While the defendants in this case attempted to label the legislative efforts as an attempt to divert business from the counterclaimants, it was actually an attempt by the truckers to obtain legislative approval to enter into competition with the defendants and counterclaimants in a field in which up to that time by legislative action they had a complete monopoly. The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon. There is no doubt also that in every way possible the

truckers tried to eliminate the opposition to its legislative program of the Pennsylvania State Grange and the Pennsylvania State Association of Township Supervisors, and even the railroads. The latter was a suggestion that shippers route through other lines rather than the Pennsylvania Railroad. It is clear, however, that the suggestion from the truckers was made in order to weaken P. R. R. objections to the Big Truck Bill and was not designed to drive the P. R. R. from the transportation field.

[fol. 111] About the middle of the decade PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc. That this action was directed against the railroads running through Pennsylvania is entirely clear. However, the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes. In such a competitive situation it is well within reasonable limits of competitive practice that the truckers, if they could do so, be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers. Further, this material was sent out with attribution to the PMTA, something the defendants never did in this campaign.

During this time it became evident to the leaders of PMTA that there was a need for a change in legislative approach and general public relations. In fact, it was decided that contributions from the truckers for political purposes should be centralized. Instead of making contributions at the county level, the knowledge of which would be known only casually by the respective leaders of the Republican and Democratic parties of Pennsylvania, it was determined to make a substantial contribution at the state level directly to the State Political Chairman of each party. Accordingly, depending upon political affiliation, all truckers were solicited for political contributions to the party of their respective choice. The combined totals were taken to Harrisburg and delivered to the chairmen of the respective parties. In total, they represented sizable con-

tributions, in one year approximating $40,000 to each political party. The Court considers this practice a rather sad commentary on the way political campaigns are financed in this state and makes no attempt to condone it. It is, nevertheless, a fact of political history in Pennsylvania.

[fol. 112] A firm of consultants, Wilder & Associates, was also employed to make a study of the activities in the public relations field of PMTA, express an opinion thereon, and make recommendations for a change of policy. This completely objective study, completed and published in December of 1949, showed clearly the attitude of the public toward the truckers as to the areas in which they were deficient and made recommendations looking to the elimination of such deficiencies. It is most impressive to the Court, sitting as a jury in this case, that no part of this 81 page report is critical of the railroads or any suggestion made that the truckers might obtain further business at the expense of the railroads; and certainly there was no suggestion of any conspiracy to attain such ends. The report is extremely critical of certain faults of a segment of the trucking industry as such. It shows that the acute problem (as related to public opinion) of road hogging, double parking in congested areas, creeping uphill and speeding down, and noise and vibration in residential areas, had pyramided through repeated application of each unfavorable stimulus occasioned by a small segment of trucks and had resulted in associating in the public mind these particular trucks with all trucks. Again, parenthetically, it may be remarked that that unfavorable association of the small segment with all trucks had always been skillfully nurtured by the railroads and had been brought to fruition by Byoir.

The PMTA then expanded its public relations department and attempted to do a straight selling job to the public and to the legislature based upon what it considered the real merits of its case. It will be recalled that it was just at this time that Byoir began its national campaign, as above described under Vilification Campaign, and the full impact of this campaign was not realized by PMTA or those in charge of its several committees. The trucking industry had supported a great number of successful candidates for the state legislature, both Senate and the House of Repre-

sentatives, and looked forward to favorable action in 1951. [fol. 113] As aforesaid, with the opposition of the administration of the outgoing Governor Duff, they had realized that under his administration there was no possibility of favorable action upon their legislative aims. It has been alleged and established to the satisfaction of the Court that in the gubernatorial campaign of 1950 the truckers had in large measure supported the candidacy of many members of the legislature who in that year were elected to office. The railroads had definitely opposed and the truckers supported candidates known to be favorable to their (truckers) point of view. While several of the candidates who had voted in favor of the truckers were defeated through railroad opposition, there were many others elected with the support of the truckers. Ironically, one of the defeated candidates in a later year, because of railroad opposition, was Samuel B. Dennison, a representative at the sessions from 1941 to 1951, who, from 1947 to 1951, had been Chairman of the House Motor Vehicle Committee. He later appeared at Harrisburg as Legislative Consultant to the truckers.

As stated above, under Pennsylvania activities, the Big Truck Bill was passed with a resounding majority in both Houses. Eventually the Bill was vetoed by the Governor as above outlined. Defendants contend strongly that PMTA in arranging for support of the Bill was guilty of such unfair concerted action against them as to amount to substantial evidence of conspiracy on the part of the trucking industry to drive the railroads out of business. The fallacy of that reasoning lies in the fact that the truckers were striving to accomplish an end in support of their own industry in order to allow that industry to compete with the railroads, and everything done in this connection was well within the limits of fair competition in private enterprise. There is not nearly sufficient evidence to convince the Court sitting as a jury in this case that the truckers intended by this action anything other than self-help, and any action taken was not calculated to destroy the railroads [fol. 114] but merely to obtain an opportunity to compete for the business with the railroads in a field theretofore denied them by statute.

With the veto of the Big Truck Bill in 1951 a change did come over the truckers in their attitude towards the railroads. All of the governing officials of PMTA were intellectually certain that the undercover attacks of the previous three years which had held the trucking industry up to scorn and the distorted views fed the public as to the results of the Maryland Road Test had been railroad inspired. But up to then they had no legal proof. So incensed were the truckers that it was decided in February of 1952 to investigate the possibility of a suit against the railroads. To quote the President of Noerr Motor Freight, Inc.: "We were trying to find out who was stabbing us in the back." Asked "What did they have to do with this suit?" Answer, "Well, if we found out who was stabbing us in the back, we were authorized to institute suit to pull out the dagger." With that thought in mind it was determined to employ a public relations firm to make a complete investigation of the whole transaction. The testimony of Mr. David B. Charnay, President of Allied Public Relations Associates, Inc., a New York public relations firm retained by PMTA in April of 1952, as to the purpose of its retainer, and which testimony is believed by the Court, is as follows:

Mr. Kohn.

"Q. You said you did not personally seek legislation as a lobbyist. One of the things you did not do in that situation was that you did not personally contact legislators."

Mr. Charnay.

"A. Let me make it clear. If I were able to get legislation, I certainly would try to get it for them. We were not hired for that. We were retained for one specific purpose, and that was to balance the scales between the railroads and truckers. The railroads were [fol. 115] having a field day; we were retained for one specific purpose, and that was to balance the scales between the railroad and truckers. The railroads were having a field day; they were wiping the floor with the truckers, and the truckers were not fighting back. The truckers would turn the other cheek every time the railroads smeared them. It was all in the press and

everywhere. The truckers did not try and answer back. Our job was to counteract that. There were others in the Pennsylvania Motor Truck Association who were working possibly directly on legislation for the truckers."

The record amply sustains the finding that Charnay and Allied immediately began to attack, by publicity releases, the Maryland Road Test; complained of an improper relation between the Bureau of Public Roads and the railroads; charged that public officials in connection with that test used railroad money, citing Messrs. Johnson and Cohen, to corrupt public information relative to the subject matter of the Maryland Test film; and made other and serious charges intimating that these same public officials might possibly have been the subject of corruption and bribery by the railroads. At this point the Court will indicate its finding on the question of bribery of both public officials and the officials of independent organizations. The record indicates beyond peradventure of doubt that Eyoir using railroad money worked in close liaison with public officials, lavishly entertained them at the expense of the railroads, and used them as dupes in the railroad campaign against the truckers. However, the Court feels that no inference should be drawn from the testimony that such bribery and corruption actually occurred in that these charges are not supported by a sufficient weight of the evidence to justify such a finding. On the other hand, it is perfectly clear to the Court that these same persons were working to further the railroads' point of view because of their own personal interests and to the detriment of the [fol. 116] public they were purportedly representing. In that light and on the basis of the information then in the hands of the truckers it is entirely reasonable that they suspected such an illegal association and that they would ask responsible government officials to investigate to determine whether or not there was such a connection. It would seem in the then state of their knowledge to be an entirely common-sense request. The defendants have asked the Court to find that all of these allegations on the part of the truckers were false and were made for the purpose of

destroying the railroads' position in the transportation industry. Nothing could be farther from the real fact. The actions were taken to protect themselves from serious and unwarranted in fact attacks. They charged that the edited film inaccurately put the trucking industry in an odious light, which it did. They charged that the United States Government, through the Bureau's sponsorship of the edited film, was devastatingly and inaccurately critical of the trucking industry, which it was. They charged also that on April 13, 1953 it was the purpose of the railroad industry to distribute a pamphlet in connection with accomplishing the same sinister purpose, which at that time it was. While the charge that the tentative findings of the Highway Research Board were fraud from beginning to end, originated by paid railroad agents using railroad money, is not supported by the evidence, the interpretation as distorted by Byoir and released to the public as the official findings did constitute a fraud upon the public and even constituted a fraud on the Chief Executive of the Commonwealth of Pennsylvania, through the Secretary of the Highway Department. The Court also finds as a fact that a deliberate distortion of a fine scientific achievement, Maryland Road Test—One, was used as one of the instruments in the campaign of the railroads to either severely limit or destroy the heavy trucking industry.

Charnay's investigation of the Byoir activities (one public relations firm investigating another) convinced the [fol. 117] truckers of something they had suspected from the outset—that the railroads and railroad money were behind the continuous attacks upon the trucking industry. Charnay also attempted in a limited degree to use the Byoir technique of phony organizations. He set about to form a completely fictitious organization to be known as the Pennsylvania Motor Safety League. While its purpose was ostensibly to help the trucking industry, its ultimate purpose was to attack the railroads. Fortunately in this case wiser heads within the organization of the PMTA and wiser counsel prevented the formation of such an organization and its utilization by the truckers in a campaign against the railroads.

It is also worthy of note at this point that although the truckers sought out and made a collection of all railroad accidents and were in a position to magnify them in a campaign against the railroads, they were never used, but were merely held in reserve for defensive use should the railroads again start their publicity barrage about truck accidents. Also in 1952 the truckers implemented the tax manual of the mid-forties and had printed an entirely new brochure indicating to municipalities that the railroads were not paying their fair share of taxes in the State of Pennsylvania, contrary to a decision of the Supreme Court of Pennsylvania, and pointing up the fact that notwithstanding such decision, no action had been taken by the public officials concerned to revoke charters. This was a frontal attack upon the railroads and over 10,000 copies of this manual were distributed urging the taxation of railroads. However, there was no attempt to conceal its origin and its purpose was to counteract the propaganda of the railroads that the truckers were receiving enormous subsidies at the expense of the taxpayers. The Court, sitting as a jury, finds as a fact that there was no purpose or intention in putting out this tax manual to destroy the railroads in the long-haul industry, but the action taken was purely defensive of the three year old campaign of the railroads against the truckers and comes within the rule [fol. 118] of reason in free competitive enterprise. That the truckers spent great sums of money in support of their public relations program by subscription of members and others in support of the trucking industry is amply established by the evidence in this case. That PMTA sought out and received a grant of $100,000 from the American Trucking Association to assist in its campaign and to underwrite the expenses of this lawsuit is also amply established by the evidence in this case. It is also clear to the Court from what happened during the preliminaries of this case, prior to the trial, that the establishment of the plaintiffs' case depended in large measure upon the Sonya Saroyan papers turned over to the American Trucking Association by a former employee of Byoir.

It is also clear, as stated in a previous memorandum opinion, that these papers enabled the truckers to establish

what they had long suspected—concert of action on the part of the railroads in a deliberate attempt to keep the truckers from a large segment of the long-haul industry or, if possible, to destroy their effectiveness in this particular field and eliminate them as competitors. It follows therefore, from what has been said above, that the truckers with the one exception above noted, in every instance acted only in support of their own industry, and without any intent to restrain commerce.

Among the complaints made by the defendants against the plaintiffs is that they engaged an emeritus professor of engineering of the University of Michigan, one Dr. John S. Worley, who, although a consultant engaged and paid for by PMTA, was held out to the public as an independent highway engineering expert. The purpose of his employment was to testify at the expense of PMTA and without attribution *in favor of* the Big Truck Bill. It will be noted that here again is emphasized the difference in approach to their respective problems by the two competing industries. Dr. Worley was not engaged to injure the railroads but to help the truckers. It is certainly within the rule of rea-
[fol. 119] son in competing industries that either one may engage outside help and seek allies to further their own respective aims, provided however, that such friends and allies are not used in a conspiracy to destroy the competitor. A concert of action which has for its purpose the crippling of competition in a particular field and if possible of effectively destroying that competition is prohibited by the Sherman and Clayton Antitrust statutes. The Court sees no violation of the statutes in the Worley episode.

Another charge of the railroads against the truckers which should be disposed of at this point is that the present action, its pleadings, depositions, and even the testimony taken at the trial have been used by Charnay as a vehicle of publicity for the sole purpose of bringing the truckers' story to the public. As a corollary thereof, the railroads charged that this action constitutes virtually malicious abuse of legal process. The railroads also point out that this suit was financed wholly from a public relations program fund as indicative of the fact that the suit was purely for publicity purposes. This contention does

not impress the Court. The result of the action clearly indicates that the plaintiffs herein had a valid cause of action which was brought in good faith and on sound factual and legal grounds. Naturally, in a case of great magnitude, it could be expected that the expenses of litigation would be rather large. How the plaintiffs individually and in concert raised the money to support the litigation is of no concern to the Court. That they chose to finance it out of the public relations fund is also unimportant. As to the charge that the pleadings and depositions, and even the testimony taken at the trial, were commented upon and in the public press by the plaintiffs or their agents is likewise of no concern to the Court. This Court has no intention of restraining the use of public documents or interfering with the right of the press or individuals to comment upon events which happen publicly in a court [fol. 120] of law, provided such use is not part of an illegal conspiracy in restraint of trade or commerce.

It was a matter of first impression with the Court upon the original reading of the complaint when this suit was instituted some four and one-half years ago that the charges made were of a rather incredible nature and that the plaintiffs herein would have a most difficult task to establish their contentions by a fair preponderance of the evidence. It is now apparent that with the exception of proving by a preponderance of the evidence actual bribery of public officials and bribery of officers of public organizations, the plaintiffs have proved by a great preponderance of the evidence that a conspiracy in violation of the Sherman and Clayton Antitrust Acts actually existed; its formation, its purpose, and the means by which it was effected; and generally in the form and manner as alleged in the complaint.

Defendants as part of their counterclaim attempted to introduce certain evidence with respect to the highway systems in the northeastern part of the United States; the effect of the use of heavy trucks thereon; the increasing cost of construction, including changes of geometric designs to meet the requirements of heavy traffic; and other evidence with respect to the economic phases of the trucking industry, all of which will be referred to briefly herein-

after. All of this testimony was excluded by the Trial Judge as being either cumulative or not relevant to the issues in the case. From what has been said before and after a review of the evidence, it is clear that the counterclaims filed are without merit and, therefore, will be dismissed.

## Summary.

The review of the record in this case, developed in practically continuous trial from October 1, 1956, to January 28, 1957, covering well in excess of 6,000 pages of record with [fol. 121] some 968 exhibits, nearly all of which were offered and received in evidence, has of necessity been extremely time consuming. It is impossible in this opinion to advert specifically to every detail of the testimony of the many witnesses or the content of the exhibits. From a consideration of the record as made in this court, together with the exhibits, the Court has stated the facts and conclusions which it deems necessary to a decision. However, the Court has examined carefully on more than one occasion the entire record and has given consideration to all of the testimony, the exhibits, the briefs and arguments of counsel thereon as well.

Without in any wise limiting the findings of fact contained in the above narrative description of the facts adduced in this case and the Court's comment thereon, a useful purpose may be served at this point in reviewing in summary form the findings of the Court in this case as a preliminary to a discussion of the law of the case and the application of the law to the facts as found.

The Court has found as a fact that the railroads and Byoir entered into a conspiracy in unreasonable restraint of trade, the nature and purpose of which was to injure the truckers in their competitive position in the long-haul freight industry in the northeastern section of the United States. This, of course, involves interstate commerce. The immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers. There is no doubt that the

railroads prior to the development of the long-haul truck industry had an actual monopoly of that field. A new industry in competition had appeared. That industry by reason of more flexibility and faster service had made great inroads in that particular competitive field and its business had increased a thousand fold. Both were regulated industries. The truckers could not operate without a certificate [fol. 122] from the Interstate Commerce Commission showing the need for the service in a particular locality. While it is true that "contract carriers" as distinguished from "common carriers" might be utilized by an individual shipper (and these carriers form a large part of railroad competition), most of these carriers are likewise regulated by the Interstate Commerce Commission and only in the case of carriers of agricultural products is there any exemption from regulation. Common carriers, of course, are in the same status as railroads. Goods offered has to be transported at published rates. There is further no doubt that at this time there was "erosion" in great measure of previous railroad business to the truckers. That such erosion would "injure" the railroads in their revenues is likewise clear. That injury, however, is not a legal injury. It is merely a diminution of revenue because of a better competitive method of transportation evolved by the trucking industry. That the railroads recognized the problem and knew the underlying factors causing their loss of revenue is abundantly clear from this record. The railroads knew, despite the higher charges of the truckers, 6¢ per mile as against 1.4¢ per mile, that the truckers were rapidly gaining business because of extreme flexibility. They knew also that even without a show of necessity on their part before the Interstate Commerce Commission they (railroads) could be licensed to establish equally flexible truck routes. (See the opinion of Mr. Justice Reed in *I. C. C.* v. *Parker*, 326 U. S. 60 (1945), and dissenting opinion of Douglas, J. re the effect of majority decision.) Instead of meeting the competition in the field and giving the shippers what the shippers wanted, they determined upon another course of action—to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the railroads. This, of course, would be to the shippers' disad-

vantage in this great area of flexibility which was clearly so vital to the shipper but would eliminate the fundamental cause of the railroads' loss of revenue. It was with this very [fol. 123] thought in mind that the combination of Byoir and the railroads occurred in August of 1949 and a definite program for accomplishing this desired result was instituted with the full knowledge and consent both of Byoir and every defendant railroad. [Briefly restated, the plan was first to create hostility to the truckers.] With that as a base the rest of the plan evolved. This plan generally had 10 fundamental objectives:

(1) To seek out or create "independent" organizations favorable to the railroads' point of view and opposed to the truckers.

(2) Through Byoir and the ostensible independent organizations create a hostile public using the method detailed under the heading, "Campaign of Vilification".

(3) Through the organizations and at the instigation of Byoir create a demand for more tax revenues by government at all levels, particularly the local level.

(4) Through Byoir and railroad contacts have one of these organizations hire a recognized and ostensibly impartial statistical group to make a study of revenue-producing methods most palatable to the public; the statistical group would be supplied by Byoir with the questions to be asked the public and the answers to these questions would form the basis for the conclusions in the study. These questions by Byoir would be so framed that only the desired answers would be forthcoming—that the truckers must be more heavily taxed. Another use of these so-called independent survey organizations was to focus attention upon the trucks as destroyers of the highways and emphasize by "statistics", based on the false premise that truckers are the prime users of roads, that the truckers were the recipients of enormous public subsidies.

(5) With these statistics on hand have the "independent" organizations through Byoir publicize them from one end of the United States to another, through speeches, magazines and news releases.

[fol. 124] (6) Interest writers of important magazines in articles attacking the truckers and present the writers with all the statistics compiled by the "independent sources".

(7) With an outstanding magazine article have the organizations, through Byoir, intensify their campaign and then seek further articles with the ever-growing research material as a basis.

(8) While all of the above was being carried out to aid financially and in every other way legislators disposed to the railroads' point of view.

(9) Present the research packages and a hostile and aroused public to the Legislature and then propose the type of legislation determined by the associated railroads of that particular state as the type of legislation desired, and which to the associated railroads appeared feasible under the circumstances.

(10) Make absolutely certain that the general public attributed the entire campaign to public-spirited organizations only, keep the railroads in the background, and conceal particularly from objective-minded public officials interested in the problem the fact that the entire campaign was a creature of the railroads, the whole cost of the campaign being borne by the railroads, and for the purpose of hindering and destroying the trucking industry as a competitor to the railroads in the long-haul transportation industry.

It is clear from the above, regardless of the success or failure of legislation proposed by the railroads unfavorable to the truckers, that a real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme. In the use of the term "good will" in this opinion I refer not only to the definition of Lord Eldon, who defined good will as "the probability that the old customers will resort to the old place", but also to the more comprehensive definition of Judge Story, "that good [fol. 125] will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it

receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." 24 Am. Jur. § 3, p. 803, and cases there cited. Therefore, the use of the term "good will" in the instant case relates not only to the direct damage done to the truckers, i. e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but refers also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions.

The defendants' actions destroyed to a large extent the public confidence which the truckers had earned by their own efforts and which they might have won additionally, especially in the light of the innumerable beneficial accomplishments of the truckers in the field of long haul transportation. We must assume that most people are honest law-abiding citizens, and that includes those engaged in the trucking field. It certainly has not been proved in this case that all or even a substantial number of truckers are law breakers. To the contrary, the evidence in this case clearly shows that, except for a small segment, the truckers are decent law-abiding citizens who obey the law, but as a result of this campaign they were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way.

[fol. 126] As a final note it can be remarked at this point that, although not outlined above, overt acts to accomplish the objectives of this conspiracy were committed among others in the states of Connecticut, Indiana and Illinois. This feature is mentioned at this point to show that this was not a series of individual conspiracies but was one large ever-growing conspiracy with the single objective of "improving the competitive position of the railroad in the field

of transportation", but by the illegal means of limitation of or destruction of the trucking industry. Restated in extremely simple form I have found the following:

1. That the defendants combined in and about May 19, 1949 with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade.

2. That they were joined in this combination by the Byoir organization on or about August 15, 1949 for the same purpose and with the same intent and for a handsome remuneration.

3. The instrumentality or means by which this object was to be achieved was primarily by a campaign designed to destroy the good will of the truckers and, secondly, by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision.

4. Hundreds of overt acts in furtherance of this plan were carried out throughout the country, and all in furtherance of the same object and design.

## The Law of the Case.

A discussion of the law of the case must involve a consideration of the following legal questions:

(1) Was there a conspiracy in violation of the antitrust statutes? This question, of course, involves legality of means; legality of object; illegality of means and illegality of object.

[fol. 127] (2) The rule of reason in free competitive enterprise:

(3) Whether, if a conspiracy is shown to exist, the defendants' activities complained of caused injury both to the plaintiffs and to the public:

(4) Whether the defenses interposed by the defendants justify the activities complained of; this includes a determination of the question as to whether, as contended by the defendants, plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute

in furtherance of an objective on the part of the plaintiffs to acquire a monopoly of the long-haul freight business:

(5) Whether, if an illegal conspiracy existed, the evidence presented is insufficient to link certain of the defendants with the activities as coconspiratory:

(6) Damages and relief.

After full consideration of the above problems the Court has determined its legal conclusions as follows:

(1) The defendants in this case formed a conspiracy in violation of the Sherman and Clayton Antitrust Acts for an illegal objective (injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors); that in concert and as co-conspirators the defendants attempted to use both legal and illegal means to accomplish their illegal objective.

(2) As to the rule of reason, the activities of the railroads and Byoir constituted unreasonable competition in a free competitive economic system.

(3) The activities of the railroads and Byoir caused injury to the trucker-plaintiffs and injury to the public.

(4) The defenses interposed by the defendants in this case are not available to the defendants under the facts of the case nor were the plaintiffs in instituting this action motivated by a desire to bring the defendants into disrepute [fol. 128] in furtherance of an objective to acquire a monopoly of the long-haul freight business.

(5) The Court, sitting as a jury, has found the evidence to be sufficient to link all of the defendants as co-conspirators in this case.

(6) As to damages and relief, the Court holds that all of the plaintiffs are entitled to injunctive relief against continuing illegal activities of the defendants. In addition, PMTA is entitled to compensatory damages, to be trebled as provided by statute, together with reasonable costs and attorney's fees; the remaining individual defendants are entitled only to nominal damages by virtue of a stipulation

filed in this action and which will be later fully discussed. But before proceeding to a discussion of the several legal questions involved a few general observations are in order.

The pertinent sections of the Sherman and Clayton Acts in this case are as follows:

Sherman Act § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

Sherman Act § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act § 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides * * * and shall recover three-fold the damages [fol. 129] by him sustained, and the cost of suit, including a reasonable attorney's fee."

Fortunately antitrust law is living law. Being far from static, it, like the Constitution, is dynamic law to be adjusted to the times and to new situations. As Chief Justice Hughes aptly remarked in *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 359-60 (1933):

"As a charter of freedom the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."

The court further pointed out that the Act should be construed in a broad and practical conception of the common law of restraint of trade and monopoly. As such the Act constitutes a flexible policy directed against all undue limitations on competition, both in the form of realized monopolization as well as partial but significant restraints of trade tending to the same end, or attempts to reach the prohibited end.

In a very comprehensive opinion in the case of *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946), at pages 809-810, 66 S. Ct. at page 1139. Mr. Justice Burton speaking for the court set forth the nature of the prohibitions of the Sherman Act in the following language:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within [fol. 130] its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose."

As has been said, a conspiracy is not made out in so many words but must be gathered from the four corners of the evidence and the inferences to be drawn therefrom. Intelligent businessmen, aided by expert legal counsel, simply do not say, or put in writing, that they are going to drive a competitor out of business. And, of course, they did not in this case. However, courts today are aware of the subtle and tacit agreements now used to effectuate business conspiracies. That foregoing statement is made with the full realization that certain phases of the Byoir campaign were something less than subtle. The picture of conspiracy as a meeting by twilight of a trio of sinister

persons, with parted hats and close together, belongs to a darker age. *McConnell, The Treble Damage Action*, U. of Ill. Law Forum 659, 661 (1950). The distinct impression of the Court, sitting as a jury, in drawing the inferences from the evidence presented, is that this was a carefully calculated plan under the guidance of competent legal counsel which sought to choose a means of injuring and, if possible, destroying interstate truck competition that would afford the greatest amount of constitutional protection and thereby seek to render it immune from the coverage of the antitrust laws. A further inference to be drawn is that the plan was to be cast in the guise of a gigantic legislative campaign in order to attempt to surround it with the protections of the right to assemble, the right to petition the legislature and freedom of speech. With that thought in mind a calculated risk was taken that the plan adopted was the safest means of carrying out the predetermined object of seeking to maintain a monopoly in restraint of trade. Unfortunately, the gamble proved unsuccessful. The campaign of vilification upon the long-haul trucking indus- [fol. 131] try, which was the real instrumentality for carrying out this conspiracy, far exceeds the factual patterns presented in the *Slick Airways* case which will be discussed *infra* in detail. This was a deliberate attempt to injure a competitor for an illegal purpose by destroying public confidence in it. And that places this case into an area long denounced by the antitrust laws.

The factors bringing about the present action are new in the field of antitrust litigation and must be examined in the light of the climate of competition as it then existed. It is a battle between two great leaders of a highly competitive industry, both staffed with capable and expert legal counsel. Public relation techniques are closely interwoven with every facet of this case. The chief device used by the railroads, and to a lesser extent by the plaintiffs, which latter did not involve violation of the Sherman and Clayton Antitrust Acts, is one long known to political experts under the term, "The Big Lie". This technique, as it appears from the evidence in this case, has been virtually adopted in toto by certain public relations firms under the less insidious and more palatable name of "The third-party

technique". Its sole means and its effectiveness is to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood. That was the technique employed almost without exception by Byoir and the railroads throughout the campaign.

We will now proceed to discuss the legal questions in the order set forth at the opening of this section of the opinion.

The Conspiracy—Means and Objectives.

An unlawful conspiracy has been defined as a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means: *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921). A lawful act may, when done by many in concert, become a conspiracy and public wrong and may [fol. 132] be prohibited; *Bedford Cut Stone Co.* v. *Journeyman Stone Cutters' Ass'n. of North America*, 274 U. S. 37 (1937). An unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939). The civil liability for acts of conspiracy flows from the damages caused by the acts committed pursuant to the formed conspiracy; accurately speaking, there is no such thing as civil liability for conspiracy as such; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies; 11 Am. Jur. § 45, p. 577, and cases there cited.

Let us look at the record in this case. The acts committed by the defendants in pursuance of their plan reveal that the defendants formed an illegal conspiracy for an illegal object—injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors. By illegal means (the destruction of the truckers' good will) they sought to obtain their illegal objective. By what they claimed were legal means—appeals to the legislature—they also sought to accomplish their illegal objective.

The defendants have strenuously contended that all of their activities were geared to a legislative program and that none of their activities come within the orbit of

activities proscribed by the Sherman and Clayton Antitrust Acts. It has been noted and the Court here restates that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large-scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were [Vol. 133] not acting as the guardian of the public welfare, as they have so earnestly asserted. Even counsel for the defendants at R. 2853 had to admit that the defendants were not motivated by "altruism".

It is in a situation such as this that the power and force of group action comes into play and the remarks of Mr. Justice Burton, *supra*, become very pertinent. When such group action is reinforced, as it was in this case, by unlimited financial resources to accomplish its objectives, it may very well and does in this case present a picture of activities proscribed by the Antitrust statutes. On the facts as found, a common law conspiracy has been made out.

The defendants in their arguments in this case have confused means and objectives. This problem was presented to Chief Judge Forman in the case of *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D. N. J. 1952), appeal dismissed, 204 F. 2d 230 (3rd Cir. 1953), cert. denied, 346 U. S. 806 (1953). At page 207 Chief Judge Forman made this pertinent comment:

> "The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved * * * It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust law."

A similar argument to the defendants' contention that their activities with regard to legislation were the only

activities for which they combined (which is untrue) was made before Judge Forman. The defendants there claimed that their appearance in that case before the Civil Aeronautics Board to block and delay the issuance of a certificate of convenience and necessity to the plaintiff to act as a common carrier was proper and legal. Judge Forman disposed of that contention in the following language at page 214:

> [fol. 134] "While it may be questioned whether any of this alleged activity by defendants of itself constituted illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objective of conspiracy, *American Tobacco Co.* v. *U. S.*, *supra*; 328 U. S. at page 809, 66 S. Ct. 1125, 90 L. Ed. 1575, and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy."

The most recent decision dealing with the problem of confusion of object and means is *Parmlee Transportation Co.* v. *Keeshin, et al.*, 144 F. Supp. 480 (D. Ill. 1956). The plaintiff in that case was a transportation company which for over a quarter of a century was in the business of transporting (for the defendant railroads) from one to another of the eight railroad stations in Chicago, passengers and baggage in the process of interstate journeys. The plaintiff alleged that one Keeshin promised a member of the Interstate Commerce Commission a valuable consideration if he would persuade the individual railroad presidents to use their influence to cause their lines to eliminate plaintiff from the transfer business in Chicago and grant the contract instead to a corporation to be formed by Keeshin. This was to be accomplished by the ICC member representing to the railroad presidents that he would exercise influence on the ICC in their favor. The complaint avers that the new company was formed, that the plaintiffs were not allowed to compete for the contract and that a less favorable contract than the one under which they formerly operated was entered into by the railroads with the new corporation in pursuance to the agreement. The

defendants argued that the fact that the contract with the new corporation was an exclusive one did not make it illegal as a monopoly—which is true. They further argued that the contract made by the railroads acting together did not indicate the existence of a monopoly because they were not [fol. 135] competitors and were therefore in a position to deal with whom they pleased. In reply to these contentions Judge Sullivan noted, at page 484:

> "The flaws in the proposition lie in the minor premise: the assumption that the railroads could lawfully act together to grant a transfer contract ignores completely the complaint's allegation that the purpose and effect of that joint action was and is to prevent competition in biddings for contracts for terminal service. Acts otherwise lawful are 'within the proscription of the anti-trust statutes, *if done for the purposes prohibited by the anti-trust laws, i.e., to eliminate competition.*'"

This Court is not condemning the field of public relations. It is only condemning it as it was used in this case, as an instrumentality of destruction rather than one of promotion. Neither does the Court determine it illegal for an industry to seek any and every proper legislative goal; nor to enlist the support of other persons in obtaining legislation. But it is illegal to use the practices and methods shown by the record of this case to destroy a competitor's good will and to use third parties as fronts to carry out a conspiracy to destroy a competitor.

The proofs in this case have definitely established joint action on the part of all of the defendants to destroy the good will and injure the business of the plaintiffs. They have proved the formation of so-called "independent citizen groups" which were mere pawns in circulating information derogatory to the plaintiffs; dissemination of false information to customers of the plaintiffs for the same purpose; the organization of groups to protest the use of the highways by plaintiffs' "Big Trucks", and the duping and using of public officials and officials of independent organizations to accomplish the same purpose of driving the plaintiffs out of competition with the defendants. The actions of the

defendants do not fall within legal bounds of either proper means or proper objectives and consequently such activities must be condemned.

[fol. 136] Rule of Reason.

With the distinction between objectives and means disposed of, we now apply the facts as found to the climate of competition as it existed at the time the defendants embarked upon their legal plan. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. The plaintiffs have strenuously argued that per se violations have been made out in this case. I do not so find. The activities of the defendants were not such as to bring them within the purview of price fixing, refusing to deal with nonmembers of an association, thereby excluding a competitor from a substantial market, and the other classes of cases covered by that rule of law. See *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684, 697 (D. Ohio 1956).

The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique. However, there is one very important distinction in the use of the technique by the parties; *the plaintiffs always used the technique for the affirmative purpose of seeking legislation which would be beneficial to themselves rather than to burden the railroads.* As they so often stated, and as the Court has found, they were seeking to remove what they called "The Chinese Wall" of low weight limitations which isolated it from the surrounding states. The plaintiffs engaged in the negative approach (which seeks to injure your competitor) only as a *defensive* measure after they were severely hurt in the public mind and the legislative halls by Byoir and the railroads. On the other hand, the defendants did not go out and seek to meet the new mode of competition by adjusting their facilities to the public demand, but rather *sought to destroy the good will built up by this new competitor through the campaign as outlined. This public relations battle of bogus organizations and dis-*

*tortion of facts and vilification was not a climate of com-* [fol. 137] *petition into which the defendants were injected. They created it.* They were faced with the budding seeds of competition growing in an area that was once a railroad monopoly in the long-haul freight business. Once the seeds started to flourish because of the flexible service given to shippers, the railroads resorted to the negative approach of injuring the competitor rather than adjusting their facilities to meet the growing seeds of competition. And they certainly could have met this competition on the field of *service* with their extensive facilities and ability to enter the trucking business in places where flexibility was desired and required by the shippers even at an increased cost. See *I. C. C.* v. *Parker*, 326 U. S. 60 (1945). Neither the railroads nor Byoir were new at this "propaganda" approach. As noted, the railroads had been harshly criticized for its use by the Wheeler Report, *supra*. Byoir received even harsher treatment for his use of the technique. He was found guilty of violating the antitrust laws in a suit growing out of its activities on behalf of the A & P, which was one of its major selling points in seeking and getting the ERPC account. Byoir's prior activities in the field are well pointed out by Judge Lindley in the case of *United States* v. *New York Great A & P Tea Co.*, 67 F. Supp. 626 (D. Ill. 1946), at pages 673 and 674, where he alludes to the false front activities. On appeal Judge Minton, later Mr. Justice Minton, also spoke harshly of Byoir's illegal activities in furtherance of a scheme to violate the antitrust laws at 173 F. 2d 79, 89, 90 (7th Cir. 1949).

It was Carl Byoir's view of antitrust law that there was no stigma attached to a violation thereof, and that "if you got caught you just ran into the wrong judge." In commenting upon the A & P decision Carl Byoir stated to Mr. Dilworth, then attorney for plaintiffs, in his deposition:

> "Now, you know and I know, Mr. Dilworth, that antitrust is not a law like going through a stop light, that it is a law on which you can go into twenty federal courts and get twenty different opinions on different [fol. 138] matters, and this was pursued. The antitrust people didn't like Carl Byoir and they pursued me

through five courts until they found a judge who had their view of antitrust. And I am not critical of it; it was his view; but as far as I am concerned I think every one of these organizations was a perfectly proper organization, *and if there is criticism that it wasn't publicized, sometimes you can't always get printed what you want to get printed.*" R. 2451; also see R. 228, 229. (Emphasis supplied.)

The above quotation, in the light of Byoir's previous conflicts with the statutes, shows a studied, consistent and contemptuous attitude toward the Antitrust Laws of the United States and his willingness to flout them at will, if the price was right.

In arriving at the conclusion that the defendants' conduct was unreasonable I have considered and alluded to: (1) The economic conditions peculiar to the industry, including the fact that both industries are heavily regulated; (2) The practices which have obtained; (3) The nature of the defendants' plan; (4) The reasons which led to its adoption; (5) The probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce and transportation. It follows logically that the ultimate effect of this plan would have been to deprive the shipping public of the great advantages of the flexible services provided by the trucking industry and would have relegated shippers to the use of railroad transportation only which was rapidly being proved out-dated (unless it adjusted itself, which it was in a position to do) to the modern demands of that same shipping public. See *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 361 (1933); *Board of Trade* v. *U. S.*, 246 U. S. 231 (1918), and *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 57 (1911) for the factors to be considered in an application of the rule of reason. [fol. 139] Applying these criteria the Court, sitting as a jury, finds that the defendants acted unreasonably in their campaign against the long-haul truckers.

## Proximate Cause.

Prior to any discussion of the public and private injury which is necessary to support the plaintiffs' cause of action it is necessary to examine a stipulation of counsel. This stipulation was entered into on 17 May 1956 and, after approval by the Court, was filed of record as docket paper 460.

The stipulation in its pertinent sections reads as follows:

> "2. No plaintiff (except plaintiff Pennsylvania Motor Truck Association) has paid any counsel fees or expenses in connection with this suit, except as stated in paragraph 4." (Note: the importance of this section and section 4 will become apparent in the "Relief" phase of this decision.)
>
> "3. The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."
>
> "4. Since 1949 plaintiffs (except plaintiff Pennsylvania Motor Truck Association) have supported the activities of the Pennsylvania Motor Truck Association by making contributions to the cost of such activities and none has objected to any such activities."

A reading of section 3 of the stipulation might at first give the impression that the plaintiffs have limited the proof of private and public injury to such that might flow from the veto of S. B. 615. This is far from the case. Proof of *monetary* (as contrasted with injury-type) dam- [fol. 140] ages and injunctive relief were the subjects of several pre-trial meetings of counsel with the Court. In the interest of limiting proof of *monetary* damage (as contrasted to injury to public and plaintiffs) and to shorten the trial of the case, counsel for the parties entered into the aforesaid stipulation. It is in that context and only that context that it is to be read. In that light it becomes apparent that its importance does not become a matter

for legal discussion until we arrive at the "Relief" and monetary (actual amount) damage phase of the decision.

In an action of this nature the plaintiff must allege and prove a violation of the act and damage to his business or property proximately resulting from the acts and conduct of the defendants which constitute a violation of the act. Injury to the plaintiffs in and of itself is not sufficient to warrant a civil action for injunctive relief and or damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination or concerf of activity. However, the injury to the public need not be nationwide in geographical scope. If it involved monopolistic effect upon interstate commerce it may be narrow in geographic scope. It must, however, injuriously and appreciably affect the public interest. *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238, 239 (10th Cir. 1948).

However, the Supreme Court has permitted plaintiffs in treble damage suits to rely on inferential and comparative evidence on the ground that the wrongdoer should bear the risk of the uncertainty which his wrong has created. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946); *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931). The Court made it clear that there is a great public interest involved in civil antitrust litigation since it forms one of the greatest deterrents to the violation of the antitrust laws by virtue of the prospect of a large money recovery by a plaintiff. Accordingly, and as noted [fol. 141] by the Court in the *Bigelow* case, difficulties of proof are no longer confused with the right of recovery.

## A.

## Public Injury.

The Court finds that defendants' activities were a substantial factor, and the proximate cause of injury to the public. The plaintiffs have shown a resultant increase in the cost to shippers and consumers of all commodities necessary to life, including clothing and food, a high percentage of which reaches consumers only by carriage in motor trucks. If the effect of the conspiracy is to increase

the cost of operation of the truckers, thereby increasing consumer's costs, an injury to the public is effected. The loss of business suffered by and expense entailed to each and every plaintiff and the industry as a whole in counteracting the undermining of public confidence was tremendous and quite obviously resulted in higher costs to the consumer. This in and of itself is a sufficient injury to support the cause of action. There is further public injury which flowed from the so-called legislative phase of the combination. Because of the legislative activities of the defendants, as set forth in the facts, the public was deprived of the flexible service and convenience supplied by this mode of transportation in certain of the states involved. Although a sufficient show of public injury has been made out on the basis of the prior discussion, this is an added proof that should be mentioned.

B.

Private Injury.

The plaintiffs have satisfied the Court by a preponderance of the evidence that the defendants' activities as set forth constituted a substantial factor in injuring the plaintiffs in their business and property. The private injury [fol. 142] was twofold, either part fully satisfying the requirement that defendants' actions constituted a proximate cause of private injury sufficient to support the plaintiffs' cause of action. The former has already been mentioned in the "Summary" section of the opinion. It was the tremendous loss of good will flowing from the defendants' efforts to undermine public confidence through its campaign of vilification. The damages flowing from the expenses entailed by PMTA in counterbalancing the defendants' campaign fully satisfy the Court of ample private injury. The damage to the individual plaintiffs through the loss of good will is also certainly present and fully meets the requirements of showing private injury. *Darden* v. *Besser*, 147 F. Supp. 376, 382 (E. D. Mich. 1956).

The second phase of the injury pertains to the legislative end of the conspiracy. Defendants' counsel in his opening argument admitted that the passage of S. B. 615 would

have enormously increased the gross revenues of trucks using the roads at a trifling increase in cost, (R. 42). A Byoir study distributed in the name of the Pennsylvania State Grange reported that fifteen typical motor carriers would have increased their gross annual earnings by more than 3½ million dollars for added license fee payments of only $26,352.00, (R. 704-710; P-112). This information was buttressed by a study of I. C. C. records which showed that five of the present plaintiffs would have grossed approximately one million dollars more in one year had S. B. 615 been passed, (R. 1316; P-169). The Byoir study further indicated that the veto meant that some five million dollars of freight was retained by the Pennsylvania Railroad because the truck limit was not raised, (R. 411; P-53). Mr. Mackie testified that in a typical area, defeat of the bill would result in a loss of revenue of $9,270.00 per truck per year (R. 1452), and one of the plaintiffs, Mr. Noerr, gave concrete illustrations of the injury to his own company's business, (R. 5473-5476). All of these [fol. 143] losses stem from the legislation in question but they are not necessary to a decision in this case. The injury to the individual plaintiffs and the PMTA flowing from the campaign of vilification fully satisfies the requisites of a valid cause of action made out by a preponderance of the evidence. The Court realizes that some of the money and expense which was expended in self-defense in counteracting the defendants' campaign would have been spent for publicity purposes without the railroad-created climate of competition. That point will be discussed in detail later in the opinion. Another important question which will be discussed at that time is whether the individual plaintiffs, except for the PMTA, have precluded themselves from recovering anything but nominal damages because of the stipulation limiting their claim to compensatory (as contrasted with injury and proximate cause) damages to those flowing from an executive act—the veto of S. B. 615.

## Defenses.

The defendants seek to sustain their theory of the case on the basis of certain legal contentions which fall into

six general categories. While the present discussion will not comment upon all of defendants' case law, every contention and every case has been thoroughly examined, and it is the Court's opinion that a review in this opinion of the said contentions will be adequate for a proper disposition of the case. Each will be outlined and discussed individually in the order in which they appear, which is as follows:

1. A judicial tribunal may not invalidate a duly promulgated legislative or executive act.

2. The doctrine of separation of powers precludes a search for executive or legislative motives in carrying out their respective functions.

[fol. 144] 3. A monopoly created by virtue of duly enacted state legislation is without the ambit of the anti-trust laws.

4. The defendants' activities merely constituted an appeal to the legislature; that to deprive them of the right to act in the manner set forth in the facts would be to deprive them of the constitutional rights of freedom of speech, freedom to assemble and freedom to petition the legislature.

5. The plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute in furtherance of their own objective to acquire a monopoly of the long-haul freight business.

6. A certain group of the defendants assert that even if an illegal conspiracy is found to exist (which they deny) they cannot be included as co-conspirators in spite of their membership, contribution to and general acceptance of the ERPC plan of attack, since they had no part in planning the details of the campaign, attended only a few of the ERPC meetings, and hence the evidence is insufficient to link them as co-conspirators.

1. & 2. These defenses relating directly to separation of powers of government are best understood by a joint discussion of the problems presented. The defendants place great reliance on the cases of *Arizona* v. *California*,

283 U. S. 423, 455 n. 7 (1931) and *Fletcher* v. *Peck*, 6 Cranch 87 (1810) to sustain their theory of the case. They argue that no inquiry may be made concerning the motives or wisdom of a state legislature or state executive acting within its proper scope of powers. By analogy they seek to carry these principles over to the case under consideration. In the opinion of the Court the analogy is not a valid one. This Court is in complete accord with the principles set forth in those cases. The plaintiffs do not seek to invalidate any legislation nor do they seek to inquire into Governor Fine's motives in vetoing S. B. 615, at least [fol. 145] at this state of the discussion. To the contrary, they seek to inquire into defendants' motives in seeking to have Governor Fine veto the measure. Further, the conduct in question preceded and was independent of the executive and legislative acts and was exerted against the entire public; it is for that reason that they are faced with the above suit. They attempted to effect a restraint forbidden by the Sherman Act and hence are not protected by legislation which helps to effectuate the conspiracy.

There may be some force and validity to defendants' argument concerning injury flowing from a legislative or executive act when we reach a discussion of the compensatory damage and relief stage of this opinion. But such argument has no valid place at this point of the discussion. The defendants' contention with respect to the two defenses under consideration is well answered by the Supreme Court in the case of *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1, 18, 19, 20 (1894). In that case there was legislative grant to the Portage Company to construct a railroad. The defendants bribed the officials of the grantee Portage Company to break their contract with the plaintiffs to construct the railroad for the Portage Company. Then by false representations the defendants induced the legislature to revoke the grant. *Fletcher* v. *Peck* was argued by the defendants as precluding any recovery by the plaintiffs. The Court first quoted from the *Fletcher* case in order to properly focus upon the law in question. It then applied those legal

principles to the facts as found in the *Angle* case and stated:

> "The rule upon which this decision (Fletcher) rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of [fol. 146] expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

It was the defendants' position in the above case that any wrong done by the Omaha Company to Portage was done by the Wisconsin legislature acting in pursuance to its undoubted power in taking away the land from the Portage Company and giving it to Omaha. Thus, no court could inquire into the influence, motives or information under which those acts were passed. In answering this contention the Court said:

> "But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the acts of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? * * * An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature

in taking away the land grant, *but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature.* There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a [fol. 147] criminal proceeding by an action against the prosecutor for malicious prosecution. * * * " (Emphasis supplied.)

A reading of this language makes it evident that it is applicable to the case at bar and the defendants' contentions in this respect must fall. Obviously, the doctrine of the *Fletcher* case has been extended to the personal protection of members of a legislative committee from a cause of action under the Civil Rights statutes when acting within the sphere of legitimate legislative activity. The Court is in complete agreement with that legal principle as set down in the case of *Tenney* v. *Brandhove*, 341 U. S. 367, 377, 378 (1951), and the principles applied in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, 224 (1949). However, they simply are not applicable to the case under discussion.

A situation somewhat analogous in principle to the case at bar is found in *Hazel Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, 247 (1944). In that case Hartford was seeking a patent and realized it had no chance before the Patent Commissioner unless it could prove it had produced a novelty. In order to do so the defendant in support of its application filed an article ostensibly written by the president of the American Flint Glass Workers Union, which in fact was prepared by the Hartford Empire Co. and its agents and attorneys. The Supreme Court ordered the patent set aside despite the fact that the Court of Appeals, in upholding the patent, expressly stated that it had not been influenced by the questionable article. In setting aside the patent the Supreme Court stated:

" * * * Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for

such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived [fol. 148] it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expenses to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators."

It is worthy of note that in the *Hazel Atlas* case, as in the case under consideration, the activities of the defendants were done without attribution in order to practice a fraud. It is also worthy of note that the Court was not impressed with the fact that the statements contained in the Clarke article might very well have been true. Here we have a situation where the statements sent out by Byoir were distortions of truth rather than truths and always without attribution. It was not only a fraud upon the legislatures and executives for an illegal purpose (to gain a monopoly), but it was also a fraud upon the public to gain that same purpose through the instrumentality of destroying the truckers' good will. Also, it should be kept in mind that the activities under attack also preceded the executive and legislative acts which the defendants claim are the only activities under scrutiny in the case. To the contrary, it is the entire railroad campaign, the destruction of good will, the fomenting of legislation and the vilification that are under attack.

[fol. 149] It should always be kept in mind that this Court has no desire to examine Governor Fine's motives in vetoing

S. B. 615. This Court is, however, interested in defendants' efforts to create motives. A cursory reading of the facts as found would quickly indicate that the destruction of the plaintiffs' good will was the primary goal of the defendants in their plan to monopolize the long-haul freight business; but even if their activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws. See also Chief Judge Kirkpatrick's opinion in *Singer Sewing Machine Co.* v. *American Safety Table Co.*, 88 F. Supp. 260 (E. D. Pa. 1949).

3. We find another group of cases which advance the proposition that a legislatively-created monopoly is without the ambit of the antitrust laws. *United States* v. *Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Okefenokee Rural Electric Membership Cor.* v. *Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954); *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439 (1945); *Parker* v. *Brown*, 317 U. S. 341 (1943); *United States* v. *Rock Royal Co-operative*, 307 U. S. 533 (1939); *Mackay Radio & Telegraph Co.* v. *F. C. C.*, 97 F. 2d 641 (D. C. Cir. 1938); *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922); *Olsen* v. *Smith*, 195 U. S. 332 (1904); and the *Slaughter-House Cases*, 16 Wall. 36 (1873).

The defendants argue that since they were merely seeking to impose legislation upon the truckers any monopoly that they may have obtained by virtue of such legislation would be a legally protected one. In this argument they ignore the fact that their campaign was far more than a mere legislative scheme. They further ignore the principle that legal means may not be used to accomplish an illegal objective. This Court agrees that a legislature has the right and power to legally create a monopoly for the general welfare of the people, and that the recipient of such a [fol. 150] monopoly is legally protected, if his conduct is otherwise legal, as are the responsible government officials carrying out the will of the legislature. Further, the beneficiaries of such a monopoly, within permissible limits, may

enforce these rights in the courts. But it is not a mere legislatively-created monopoly that is under attack in this case. It is a conspiracy to destroy a competitor; a conspiracy to destroy his good will; the distortion of facts to further that end; the presentation of distorted and false information to the public and to public officials that are under attack, as well as the fomentation of government restrictions.

All of the cases cited by the defendants to advance the contentions set forth in this category explicitly recognize that the recipients of such a monopoly are not PER SE without the ambit of the antitrust laws, and certainly not when a legislative campaign forms a part of a conspiracy to gain an unlawful end. The language of the cited cases alluding to this problem is worthy of note:

In *U. S.* v. *Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945), the Court at page 524 said:

> "It need hardly be observed, and is not questioned by the defendants, that, notwithstanding the important statutory function in the determination of interstate railroad charges, rates, fares, services, and practices of the Interstate Commerce Commission, the Sherman Act applies to interstate common carriers by rail as well as by other means. * * *."

And in *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439 (1945) at page 456:

> "These carriers are subject to the anti-trust laws."
>
> * * * Regulated industries are not per se exempt from the Sherman Act * * *."

Finally, in *Parker* v. *Brown*, 317 U. S. 341 (1943) at page 351:

> [fol. 151] "There is no suggestion of a purpose to restrain state action in the Act's legislative history * * *."
>
> "True, a states does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful."

The plaintiffs in this case are not seeking to invalidate the legislation itself on the ground that it violates the Sherman Act as in *Parker* v. *Brown, supra*, nor are they seeking to undo the action of a state in creating a monopoly. See *Slick Airways, Inc.* v. *American Air Lines, supra*; cf. *Forgett* v. *Scharf*, 181 F. 2d 754, 756, 757 (3d Cir. 1950); *U. S.* v. *I. B. C.*, 150 F. Supp. 397, 404 (S. D. N. Y. 1957).

The defendants place great reliance on the case of *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co., supra*. That case involved an action against a competing power company, Florida Power and Light Company, the City of Jacksonville, which was also in the power business, and the Commissioner for Utilities for the City of Jacksonville. The plaintiffs alleged that in pursuance of a conspiracy between the defendants they induced the Florida Highway Department to refuse permission to the plaintiffs to construct proposed lines along a state highway (which because of the marshy condition of the land was the only feasible route) by virtue of false arguments and a smear campaign that there were already pre-existing lines over the same route. The District Court found that the transaction was not one of interstate commerce because the sale and delivery to the ultimate consumer was in Florida in spite of the fact that the plaintiff's power source was in Georgia and the transmission lines carried it from that source continuously into Florida. In the alternative it found that even if interstate commerce were involved, the restraint was insubstantial and indirect. There is no doubt that interstate commerce is involved in the case at bar and further that the effects of the conspiracy upon that inter-[fol. 152] state commerce are both substantial and direct. The District Court in *Okefenokee* further found, and the Circuit Court agreed, that the orders complained of were the sole responsibility of the administrative boards, and the subject matter was exclusively within their jurisdiction; hence, the validity of those orders could be attacked only in an action of mandamus or other such remedy in the state court and could not be collaterally attacked in an antitrust proceeding.

The plaintiffs have not here limited themselves in their proofs to those injuries proximately resulting from the veto

of S. B. 615 in seeking to sustain their cause of action. Their allegations and proofs go far beyond anything so narrow as that executive act. The effect of the campaign to destroy the truckers' good will had a very substantial and direct effect upon interstate commerce and hence this case is beyond the law of the *Okefenokee* case insofar as plaintiffs' ability to sustain their cause of action is concerned. Defendants have earnestly striven to convince the Court, sitting as a jury, that the plaintiffs' entire case (not simply their right to compensatory damages) is limited to complaints of the defendants' attempts to seek legislation and the loss flowing from such. Hence, they seek to bring themselves within the purview of the *Okefenokee* case. In that respect they have failed to convince the Court.

Further, the truckers do not contend that they have an unrestricted legal right to use the highways; nor are they attempting to alter any decision of any responsible public official. But they did have a legal right to be in the transportation business. Unlike *Okefenokee*, and like *Angle*, the defendants conspired to destroy the good will of their chief competitor in furtherance of their illegal objective, independent of any legislative or executive act. The limitation of the case to an executive act appears only when the stipulation of counsel comes into the fore upon a discussion of the compensatory or actual damages to be allowed the plaintiffs.

[fol. 153] Any discussion of immunity from the antitrust laws because of the alleged presence of a legislative act as the instrumentality for furthering the object of monopolizing a segment of an industry requires an examination of Mr. Justice Holmes' opinion in the case of *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358 (1909). This is the last of three cases upon which the defendants place great reliance, the other two being *Fletcher* v. *Peck* and the *Okefenokee* cases. The *Banana* case has been reviewed on many occasions since it was decided in 1909, and a proper examination of the law as set down in that case requires a reading of that decision in the light of subsequent Supreme Court decisions. The two most enlightening expositions are found in *United States* v. *Sisal Sales Corp.*, 274 U. S. 268, 275, 276 (1927) and *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 288 (1952).

An examination of these cases makes it apparent that the rule of the *Banana* case is not controlling under the facts as found. The court in the *Banana* case simply held that it was not the Congressional intent in passing the Sherman Act to extend its coverage and prohibitions to an alleged monopoly grounded on a seizure of property in pursuance of a sovereign act of a foreign nation. They then found that the acts in question did not constitute a tort in the place where the activity occurred. In the case under consideration the railroads' activities were in no way limited to securing legislation or influencing executive acts. The principle that no legal damages can flow from the acts as such is important in this case only as to any limitation upon the monetary damages claimed by the plaintiffs. Finally, as opposed to the facts in the *Banana* case, all of the facts—the destruction of good will, the vilification, the distortion, as well as the attempts to foment legislation, occurred within the United States.

In the *Sisal* case the court granted an injunction against several individuals and corporations who by virtue of a conspiracy had obtained control of the importation and sale of [fol. 154] sisal from Mexico and a complete monopoly of the internal and external trade and commerce in that product. Although sisal was a product of Mexico, a foreign country, and the monopoly was effectuated by securing the passage of discriminating legislation in that country, the court held that the activities in question were in violation of the Sherman Antitrust Act and the Wilson Tariff Act and that the case was not controlled by the *Banana* decision, pointing to the above-referred-to narrow application of the *Banana* doctrine.

In the *Bulova Watch Co.* case, Bulova sought an injunction and monetary damages against an American citizen and resident for acts of trade-mark infringement and unfair competition consummated in Mexico. Learning that the plaintiff, which produced a nationally advertised watch, had not registered its trade-mark under the laws of Mexico, the defendant procured a Mexican registration for himself for the trade-mark "Bulova." He then proceeded to conduct a watch business in Mexico City, where without Bulova's authorization and with the purpose of deceiving

the buying public, he stamped the name "Bulova" on watches there assembled and sold same, many of them eventually turning up for repair, in the United States. The defendant argued that the *Banana* case was controlling and that the plaintiff's cause of action should be dismissed. In refuting this claim the court said at page 288:

> "*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), compels nothing to the contrary * * * This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts. Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court [fol. 155] held as much in *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), and *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927). As in *Sisal*, the crux of the complaint here is 'not merely of something done by another government at the instigation of private parties;' petitioner by his 'own deliberate acts, here and elsewhere . . . brought about forbidden results within the United States.' 274 U. S., at 276 * * *"

In the light of the above cases and discussion it is evident that the *Banana* case is not controlling of the outcome of this case, certainly insofar as the plaintiffs sustaining their cause of action.

4. We now come to a contention by the defendants which has been previously mentioned with respect to the Court's finding concerning the birth of this conspiracy and the calculated risk pursued by the railroads in their campaign against the trucking industry. This Court is most sensitive to the fact that constitutional rights are not to be treated lightly. The desire to insure against any tyranny of law was the moving force behind the creation of our great constitutional safeguards. It is with that thought in mind that the Court approaches this contention, namely,

that the defendants' activities or concert of action are protected by virtue of the constitutional rights of freedom of speech, freedom of assembly, and freedom to petition the legislature. The defendants point to the cases of *U. S.* v. *CIO*, 335 U. S. 106 (1948); *Near* v. *Minn.*, 283 U. S. 697 (1931); *U. S.* v. *Cruikshank*, 92 U. S. 542 (1875), among others, in support of their argument. The Court has thoroughly examined the legal principles set forth in those cases, as well as the more recent expositions on those subjects and allied subjects, and finds that they do not extend to the conduct in question. There is no question of a prior restraint involved in this case. The defendants are not being precluded from publishing anything within legal limitations; nor are they being, nor will they be, restrained from petitioning the legislature. Furtner, the Court is not pre- [fol. 156] cluding the defendants or anyone else from seeking out allies. As has already been stated, this is no attack upon public relations or the achievement of a legislative goal through publications, speeches, press releases, or the alignment of friends to seek to accomplish a valid legislative purpose. But when these resources are utilized for the purpose of applying the great power and wealth of group action against a competitor in order to accomplish an illegal objective—the monopolization of the long-haul freight business, they become something more than mere freedom of speech, freedom to assembly, or freedom to petition the legislature—they become an illegal conspiracy. When facts are distorted, allies are "created", public and private officials are "duped" and "used", attempts are made to secure decisions of public officials by virtue of "facts" and "research" which are distortions of truth, and which in the defendants' own language constituted the "planting" of their "poison", we go far beyond the scope of constitutional privilege. *Kansas City Star Co.* v. *U. S.*, 240 F. 2d 643, 665, 666 (1957). It is not now, and it never has been the law, that a common law conspiracy is within the confines of constitutional protections. The clear and present danger test has never been applied to a conspiracy which reaches the stage of hundreds of overt acts in pursuance of a plan to destroy. This situation has been presented to the Supreme Court before in the case of *Giboney* v. *Empire Storage and*

*Ice Company*, 336 U. S. 490 (1949). The legal principles stated there are certainly applicable here. This is a new type of conspiracy carefully planned to circumvent prior decisions. The *Giboney* case is one of a series of cases involving the application of freedom of speech to peaceful picketing, but is not in any way limited to that state of facts. The case concerned the constitutional power of Missouri to apply its anti-trade-restraint law to the activities of labor unions, and to enjoin union members from peaceful picketing carried on as a course of conduct which [fol. 157] was in violation of the Missouri law noted. The State law in question reads as follows:

> "Combinations in Restraint of Trade Declared a Conspiracy. Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, *transportation*, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. Mo. Rev. Stat. Anno. § 8301 (1939)." (Emphasis supplied.)

The similarity to the antitrust laws is certainly of more than passing interest. In that case an ice peddlers' union was seeking to break down the resistance of nonmember peddlers who refused to join the union by inducing wholesale distributors to agree not to sell ice to nonunion peddlers. The union's objective was to secure higher wages and better working conditions for its members. When the plaintiff/distributor refused to go along with the union plan, the union resorted to peaceful picketing, the effect of which was to reduce the distributor's business 85%.

In upholding the grant of the state court injunction against a continuation of the defendant's activities in that case, Mr. Justice Black stated at pages 501 and 502:

> "* * * No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of

speech or press to violate valid laws designed to protect important interests of society."

"* * * Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts * * * For the placards were to effectuate the purposes of an unlawful combination, and their sole, [fol. 158] unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

* * * *Such an expensive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.*" (Emphasis supplied.)

There is no question but that the language above is applicable to federal as well as state laws which deem a course of conduct to be detrimental to the public good and illegal. The antitrust laws are valid laws. They indicate the public policy of the Congress of the United States in the field of competitive business. The defendants have engaged in a course of conduct which satisfies the requirements of a common law conspiracy as well as a violation of these laws. *Caraway* v. *Ford Motor Company,* 148 F. Supp. 776, 777 (D. Mo. 1957). In that posture it becomes apparent that the defendants' conduct is not within that broad expanse of conduct which is protected by the First and Fourteenth Amendments. What the defendants have combined to do is something more than free speech; something more than freedom to assembly; something more than a petition

to the legislature. They have engaged in a course of conduct designed to destroy the good will of a competitor in order to secure a monopoly—all of this in violation of a valid public policy set down many years ago by the Con- [fol. 159] gress of the United States. The Supreme Court has said explicitly that a course of conduct in violation of a strong public policy established either by law or ad hoc decisions may constitute a course of activity without the ambit of constitutional protections. *Hughes* v. *Superior Court*, 339 U. S. 460 (1950); *International Brotherhood* v. *Hanke*, 339 U. S. 470 (1950); *International Brotherhood* v. *Vogt, Inc.*, 25 L. W. 4505.

Much stronger is the fact situation as found by the Court in this case than of those above cited. Further, the Court finds that the defendants also violated another Federal law in the course of their campaign of vilification. In pursuing this plan the railroads, through Byoir, staged a television program broadcast in the name of the Association of Pennsylvania Township Supervisors over Station WGAL in Lancaster, Pennsylvania, which failed to disclose the railroad sponsorship, in violation of the Federal Communications Act, 47 U. S. C. A. § 317,[1] which reads as follows:

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(1) 47 U. S. C. A. § 153 "Definitions (b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, *pictures*, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (Emphasis supplied.)

(k) "'Radio station' or 'station' means a station equipped to engage in radio communication or radio transmission of energy."

Subsection (b) of this section defining radio communication includes television as one form of radio transmission and this chapter applies to every phase of television. See *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 155 (3d Cir. 1950), cert. den., 340 U. S. 929 (1951).

At page 155 Chief Judge Biggs said:

"Section 3(b), 47 U. S. C. A. § 153(b), defines 'Radio communication' as 'The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *'. The television and radio industries have construed this definition to include television as 'one form of radio transmission'. There can be no doubt of the correctness of this construction."

"All matter broadcast by any radio station for which service, money, or any other valuable consideration is [fol. 160] directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person."

Hardy, the Byoir agent in Pennsylvania, prepared the telecast, and the ERPC ultimately paid for it in full. In accordance with the standard procedure throughout their campaign there was no mention of the ERPC or Byoir. Further, there is ample evidence to warrant the finding that there was no intent to discontinue the above-noted practice. To the contrary, had it not been for this lawsuit there no doubt would have been an increased use of TV and radio by Byoir under the sponsorship of a "front" and, of course, without attribution to the defendants.

Circuit Judge Prettyman in commenting upon this provision of the Communications Act stated that Congress has frequently placed limitations upon the use of the mails and broadcasting. In referring to broadcasts he pointed out that such activity was permeated with a public interest and hence the public was entitled to know who was addressing it over the air. He pointed out that all political parties identify themselves over the air in order to make their appeal useful and that the only reason for anonymity of political broadcasting must be a purpose of deception. *Communist Party of U. S.* v. *Subversive Activities Control Board*, 223 F. 2d 531, 556 (D. C. Cir. 1954), *reversed on other grounds* in 351 U. S. 115 (1956); cf. *United States* v. *Harriss*, 347 U. S. 612 (1954) and *Securities & Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd. 209 F. 2d 44 (3d Cir. 1953).

It has been the position of both the railroads and Byoir that the success of their campaign was entirely dependent upon nonattribution to the railroads. In the light of the frequent distortion of facts by Byoir in its news releases, Judge Prettyman's comment concerning deception becomes [fol. 161] extremely pertinent. In any event, this is a further example of how the defendant's conduct, although at-

tempted to be shrouded with a legislative cloak, ultimately narrows down to an illegal conspiracy to utilize the group power of the ERPC and Byoir to destroy the good will of the trucking industry in order to secure a monopoly in restraint of trade and in violation of the antitrust laws.

Another case dealing with this subject is the *Associated Press* v. *United States*, 326 U. S. 1, 7 (1945). The court there stated that it would degrade the clear and present danger doctrine "to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act."

And in the case of *Kobe* v. *Dempsey Pump Co.*, 198 F. 2d 416, 424, 425 (10th Cir. 1952), cert. denied, 344 U. S. 837 (1952), we find a situation where the defendants had instituted admittedly valid patent infringement suits as part of a broader design to violate the antitrust laws. The court held that in the light of that improper objective the privilege of bringing a valid suit was no longer present and the conduct was found to be illegal. Also see *Cape Cod Food Products, Inc.* v. *National Cranberry Association*, 119 F. Supp. 900, 907 (D. Mass. 1954), and *Forgett* v. *Scharf*, 181 F. 2d, 754, 756, 757 (3d Cir. 1950).

In the light of the facts as found and the applicable cases, the defendants' argument that their conduct is constitutionally protected must fall of its own weight.

5. The Court will not go into great detail in examining the question of plaintiffs' motives in instituting this action because that question has been covered extensively under the heading of "The Counterclaims". It will simply be mentioned that neither a finding of improper motives on the plaintiffs' part in bringing suit nor a determination that the plaintiffs were also monopolists would constitute a defense, under the circumstances, to plaintiffs' cause of action. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214 (1951); *Moore* v. *Mead Service Co.*, 340 U. S. [fol. 162] 944 (1951); *Foremost Promotions* v. *Pabst Brewing Co.*, 15 F. R. D. 128 (N. D. Ill. 1953); *U. S.* v. *Cotton Valley Operators Committee*, 75 F. Supp. 1 (D. La. 1948); *Higgins* v. *Shenango Pottery*, 99 F. Supp. 522, 525 (W. D. Pa. 1951); and 29 *N. Y. L. Rev.* 1463, 1470 (1954).

6. We come now to the defendants' final contention. This defense is presented on behalf of the following defendants: Boston and Maine Railroad, Canadian National Railways, Canadian Pacific Railway Company, Lehigh & New England Railroad Company, Maine Central Railroad Company, Pittsburgh & West Virginia Railway Company and Charles J. Graham, Individually and as President, the Delaware and Hudson Railroad Corporation, The New York, New Haven and Hartford Railroad Company, the Union Railroad Company and Fred W. Okie, individually and as President of that Company. They argue that even if a conspiracy is found to exist, the mere fact of membership in ERPC does not establish concert of action on their part, and that there is not sufficient other evidence to include them as co-conspirators. The Court agrees with the first part of their arguments. Mere membership in an unincorporated association, in and of itself, is not sufficient to establish liability for conspiracy. *Phelps Dodge Refining Corp.* v. *FTC*, 139 F. 2d 393, 396 (2d Cir. 1943). If the purposes of an association are lawful on their face its members should not be held for the acts of the association outside its purposes, *unless knowledge of the illegal acts is brought home to the members. Phelps Dodge Refining Corp.* v. *FTC*, *supra.*

In the light of the italicized reasoning the Court must differ with the latter part of defendants' argument, viz., that the evidence does not prove knowledge on the part of these defendants of the real ERPC objective and purpose. On the basis of all the evidence the Court finds that these defendants, although not involved in the carrying out of the details of the campaign, had full knowledge of its illegal object and general means for achieving that [fol. 163] objective. First of all, the Byoir contract with the ER-TC provided in paragraph 7 that "The party of the second part (Byoir) agrees to consult with and be wholly guided by the party of the first part (ER-TC) on all questions of policy to the end that no material shall be released to the public, or to anyone, giving any impression contrary to the established policies of the party of the first part" (R. 101-102; P-4). The Transportation Committee (ER-TC) was appointed by and created by the ERPC and these de-

fendants were regular contributing members of the ERPC. Further, the Court finds that the provisions of this section of the contract were followed and that the responsible committee heads of ER-TC were always kept abreast of Byoir's activities and that they in turn reported to all the participating members of ERPC.

All of the railroads were assessed under the Conference budget and it was on this basis that the individual contributions to the Conference were allotted. This same budget contained a specific item for the Competitive Transportation Committee (ER-TC), which was by far the largest item in the entire budget, and that budget was sent to all members of the ERPC including the above mentioned defendants (P-195).

In order to buttress this evidence we need merely to look at Canadian National Railway Company's answer to plaintiffs' interrogatory No. 3 in which they stated that their payments to ERPC " * * * were made from time to time upon the understanding that the same, together with payments of other members of ERPC were to be used for the requirements of ERPC as from time to time described in its budgets and requests for such payments." The Canadian Pacific Railway Company in answering the same further admitted that " * * * such payments were made from time to time upon the understanding that the same, together with payments of other members of ERPC, were to be used for the requirements of ERPC" (P-264).

Further, the minutes of the Conference specifically showing appropriations for the competitive Transportation [fol. 164] Committee, including Byoir's activities and such other activities as the rural roads film, were sent to all members of the ERPC, (P-190). These same minutes specifically indicate the attendance of Messrs. Okie and Graham, two of the above defendants. An examination of the notes of testimony reveals that Mr. Girdler's (Byoir's ERPC account executive), memorandum setting forth the objectives of the program was sent to all of the railroad presidents (R. 267) and that the entire ERPC approved the Byoir plan (R. 845-846). While it is true that the memorandum obviously did not set forth the details of the conspiracy,

it did sufficiently lay the groundwork from which any jury might infer, along with all the other evidence, the presence of knowledge.

The evidence further reveals that Byoir reported to the presidents themselves almost every month (R. 847), and that Mr. Deegan, the Public Relations Subcommittee head, approved the Byoir bills to the Conference. Of course, Mr. Deegan was appointed by and represented all of the Presidents as head of that Subcommittee. There is no question but that ERPC was familiar with the goals which Byoir sought to attain and that the President's Conference never disapproved anything which Byoir did in carrying out the terms of its agreement (R. 224, 225; 1457-1458).

Finally, it must be remembered that competition by nonattribution was not something new to the railroads, as evidenced by the criticism of the Wheeler Report. In the light of that report it becomes more evident that all defendants knew what was meant by the "objectives" and the ERPC "policy".

The Court points to these specific evidences of knowledge not with the intent of having them constitute the sum total of such evidence. They are merely indicative of some of the more obvious considerations that led to the Court's finding that there was ample evidence of knowledge on the part of all defendants, and that as representatives acting in behalf of their respective companies, all defendants were [fol. 165] co-conspirators in this illegal plan to ultimately destroy the trucking industry. It is hornbook law that the agreement need not be proved by direct evidence and that conduct pointing to concerted action is sufficient to make out membership in, and the presence of, a conspiracy. In order that one be found guilty as a conspirator it need only be shown that, with knowledge of the conspiracy, he knowingly performed acts designed to promote or aid in the attainment of the object of the known conspiracy. *United States* v. *National City Lines*, 186 F. 2d 562 (7th Cir. 1951), cert. denied, 341 U. S. 916 (1951).

There has been presented ample evidence to satisfy the Court as to a finding of knowledge, as well as a finding of agency on the part of the presidents to impute their con-

duct to the respective corporate defendants. As stated by the court in *U. S.* v. *Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953), in a suit under the antitrust laws, once a conspiracy is shown to have existed, only slight evidence is necessary to connect individual co-conspirators with the illegal undertaking. In the case at bar more than slight evidence has been presented to and believed by the Court.

In concluding this phase of the opinion, the Court will summarize and make a few general observations concerning the presence of the conspiracy. It is clear that the plaintiffs prove an intent to unreasonably restrain trade and hundreds of overt acts in furtherance of that illegal object. Without limiting anything that has already been stated there are three important factors of this case which demonstrate defendants' ultimate objective. First, the railroads realized that if truck rates were increased appreciably above their already higher price shippers would have to again use the railroads despite the flexibility and service of the truck. Every phase of the Byoir-railroad campaign was designed to do that very thing. Secondly, they further realized that any change in the amount the truckers paid in state and local taxes would greatly weaken them as a competitive factor and, of course, their "use" of the independent or- [fol. 166] ganizations and distortion of facts was constantly aimed in that direction. Finally, a very interesting situation arose during the Korean conflict which bore directly upon the question of intent to restrain commerce. A discussion arose among members of the ERPC Public Relations Subcommittee concerning the antitruck program being carried out by Byoir and the ERPC in the light of an impending freight car shortage brought on by the Korean War. The participants were fearful of discontinuing the campaign, and yet they wondered how they could justify their efforts to make long-haul trucking more expensive when *with the car shortage they were not in a position to handle any greater volume of business.* The problem was well illustrated in a letter from Mr. Selvage to Mr. Deegan dated August 9, 1950 (D-28). The pertinent section reads as follows:

> The program to date has been largely negative aimed directly at the trucks and designed to curb their more

nefarious activities. Now, with a war situation approaching, with the possibility that there would be a shortage of freight cars (and resultantly a demand for using any kind of a vehicle to move cargo), might it not become unpopular to urge curtailment of any form of transportation. It would be like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it."

James G. Lyne, Editor of Railway Age, commented upon the same problem in a letter of September 26, 1950 to Mr. Littlefield (P-251) and noted that the position of the ERPC concerning trucks would certainly be challenged because they "are playing the dog in the manger in that they are trying to make things tough for the trucks, while they (Railroads) themselves cannot handle the traffic." However, in spite of these queries Mr. Deegan stated flatly that there was no alteration in the campaign (R. 1850, 1851). It appears rather incongruous that the self-styled guardians of the public interest should have such an utter contempt for the same interest during a time of emergency. Mr. [fol. 167] Lyne, in the above-mentioned letter, after stating the problem gave his own answer which indicated to this Court a completely self-serving attitude. While cast in language indicative of a railroad concern for public interest, its true import was to the effect that "we know what OUR standard answer to the public is whenever we are approached with such a situation."

## Relief.

The subject of relief will be discussed under three separate headings for the purpose of clarity, namely, Injunctive Relief, Counsel Fees and Costs, and Compensatory (actual) Damages.

## A.

## INJUNCTIVE RELIEF.

On the basis of the facts as found it is apparent to the Court that the plaintiffs, both the individual ones and the PMTA, have been irreparably harmed and that there is a

strong possibility that the defendants are ready, willing and able to continue with their campaign to destroy the good will of the long-haul trucking industry unless they are restrained. While it is true that the intensity of the campaign has diminished with the institution of this suit, it is also clear that it will be renewed with equal vigor upon a termination of this litigation unless the Court grants injunctive relief to the plaintiffs. The defendants were ready to extend the campaign to other states and to intensify activities in the states initially chosen as starting points in the campaign to monopolize the industry. In the light of those facts and the defendants' propensity towards the use of the technique set forth in extenso in this opinion, a restraining order will be issued in favor of all plaintiffs and against the ERPC and all the corporate defendants, including Byoir. *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 462 (1945). All individual defendants will be excluded since they are either officers or employees of the corporate defendants and as such will be bound by the terms of the injunction to be issued.

[fol. 168] In government antitrust cases it is customary to allow the parties to submit a form of proposed restraining order to guide the court in the exercise of this equity power. Since there is no difference in principle between a government suit and a private suit under the antitrust laws, the Court will utilize that same procedure in this case. The plaintiffs are to submit a proposed injunction, not inconsistent with the findings as set forth, within thirty (30) days from the filing date of this opinion. The defendants, on the other hand, may file exceptions thereto within fifteen (15) days, and after hearing thereon the final order will issue.

## B.

## ATTORNEY'S FEES AND COSTS.

In the light of paragraph two of the stipulation of counsel set forth in this opinion, supra, stating that the costs including the attorney's fees were borne by the PMTA only, such fees will not be awarded in favor of the individual plaintiffs. At an appropriate future date the Court, in

accordance with the pre-trial discussions concerning injunctive relief and proofs of the plaintiffs' actual damages and costs, will take testimony as to the extent of PMTA's costs and a reasonable attorney's fee. Thereafter, an award of costs and a reasonable attorney's fee will be made in favor of the PMTA and against all the corporate defendants including Byoir; the expense to each railroad defendant (ERPC and the individual defendants will be excluded) will be apportioned according to their 1951 percentage contribution to ERPC. Byoir's contribution will be stated under "Summary of Relief."

C.

COMPENSATORY DAMAGES.

On the basis of the Court's conclusions of law all the plaintiffs are entitled to threefold the damages suffered by them due to injury to their business and property flowing from the defendants' conduct. In accordance with the pre-[fol. 169] trial agreement that evidence of actual damage would be heard at a later date in the event that plaintiffs sustained their cause of action, plaintiffs limited their proofs to evidence of general injury flowing from defendants' conduct without attempting to introduce evidence of the actual damage to each individual plaintiff. If it were not for the stipulation of counsel referred to, supra, the Court would be prepared to grant damages to each individual plaintiff as well as the PMTA upon a hearing of evidence pointing to the actual damage suffered by them.

The damages to the individual plaintiffs would fall into two main classes—those flowing from the direct loss of good will, prestige and business, as a result of the campaign of vilification and other Byoir activities, and those flowing from the loss of potential revenue and consequent loss of profits as a proximate cause of the defendants' campaign to foment legislation. However, there have been drastic limitations placed on the scope of recoverable damages in this case by virtue of the aforesaid stipulation of counsel which limits recovery insofar as the individual plaintiffs are concerned to *those damages flowing from the loss of potential revenue occasioned by Governor Fine's*

*veto of* S. B. 615. The stipulation specifically excluded the PMTA from any such limitation. Because of these considerations any attempt to ascertain damages will require a distinction between those flowing to the individual plaintiffs and those flowing to the PMTA.

1.

PMTA Damages.

As already stated, the defendants' tactics ultimately forced the PMTA, as the representative of the trucking industry in Pennsylvania, to resort to a campaign of self-defense or face increasing difficulties with the ultimate possibility of extinction. The expenditures directly occasioned by that defensive campaign will be returned to PMTA in the form of a money recovery. Evidence of such [fol. 170] expenditures proximately resulting from the defendants' *illegal* activities will be heard at a later date along with the evidence of attorney's fees and costs. In determining the extent of recovery to PMTA the Court will take into consideration the fact that PMTA would have expended considerable sums for publicity purposes independent of the railroad activities; it will also consider the fact that the PMTA budgetary trend in the field of publicity was an upward one, again independent of railroad activities. Since the stipulation of counsel, which will be again referred to in detail, does not apply to PMTA they shall recover any damages that they may prove at the appointed time. These damages shall be assessed against all the corporate defendants, including Byoir, but shall not extend to ERPC and the individual defendants. All the damages plus reasonable attorney's fees and costs shall be assessed in the following manner: twenty percent to be borne by Byoir, said amount not to be reimbursed by the ERPC; the remaining eighty percent to be assessed against the remaining railroad-corporate defendants on the basis of their percentage contributions to ERPC for the year 1951.

2.

Plaintiffs Other Than PMTA.

These plaintiffs were injured as a proximate result of the defendants' activities in two ways: (1) All of Byoir's and the railroads' activities other than the fomentation of governmental restrictions resulted in a substantial loss of good will (business losses) to these plaintiffs; (2) the fomenting of governmental restriction when done in the manner set forth in the findings and as part of an unlawful object of maintaining a monopoly caused injury to these parties by increasing the cost of operation and/or preventing the carrying of greater loads. Either or both of these injuries are legal injuries insofar as the *fact* (proximate cause), as contrasted with the amount of injury is concerned. However, the second type of injury, in the light [fol. 171] of the stipulation of counsel, cannot be regarded by the Court as a legal injury insofar as the calculation of *amount* of damages is concerned.

While it is true that the damage flowing from the loss of good will is difficult of ascertainment, such difficulty has never been associated with impossibility of ascertainment. The Court in view of its conclusions would (absent the stipulation) grant actual damages to each of these plaintiffs upon the presentation of evidence of their individual losses. *Darden* v. *Besser*, 147 F. Supp. 376, 382 (E. D. Mich. 1956). However, the presence of the stipulation completely alters the case at this point and severely limits the amount of recovery on the part of these plaintiffs.

The standard to be applied in ascertaining the *amount* of damages in treble damage actions was set down in the case of *Story Patchment Co.* v. *Paterson Co., supra,* at page 563:

> "'The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.'"

Subsequent decisions have clarified the standard and indicated that a liberal interpretation is to be applied to that rule. In effect, these subsequent cases, such as the *Bigelow* case, *supra*, establish the rule that the measure of proof for the fact of damage is identical with the measure of proof of the amount. Either may be sustained upon a showing of any substantial evidence in the record to support such a finding. See *McConnell, The Treble Damage Action* at 667, 668, *supra*. As a practical matter the courts have come close to applying the damage rule applicable to the tortious confusion of goods (let the wrongdoer's liability for damages be measured by the value of the entire mass unless he can introduce evidence of the separate values of [fol. 172] the tortiously acquired property and the finished product). This rule was applied in a case where the defendant motion picture operator mixed the receipts from the monopolized shows with the non-monopolized ones and the plaintiff relied on the *defendant's mixed* gross profits as his measure of damages. The court allowed the mixed amount as the measure, less the leasing rental cost, relying on the equitable doctrine that the defendant's wrong caused this difficulty of proof, and therefore he should not be heard to complain of the liberality of proof. See *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952); also *McConnell, The Treble Damage Action, supra*, at page 668.

However, throughout this thread of liberality in the ascertainment of actual damages (with which the Court is in agreement) there is an absence of cases dealing with a fact situation as presented here because of the stipulation limiting recovery in favor of these plaintiffs to damages proximately flowing from the executive act in vetoing S. B. 615. And it is that factor, and that factor alone, which necessitates a different result in this case. It is undoubtedly true that this Court must apply the same standard to the ascertainment of the *fact* of damage as it does to the ascertainment of the *amount* of actual damage. However, superimposed upon that rule is the rule that legal injury cannot flow as a proximate result of a duly constituted legislative or executive act. A governor acting pur-

suant to his authority in vetoing a bill cannot be the proximate cause of monetary injury to a party who would have benefited by the legislation in question. And yet that is what this Court would be required to do in order to grant full compensatory damages to these plaintiffs. As has been noted, this stipulation was entered into by all counsel in the interest of a speedy determination of the issues presented at the trial as to liability only without any coercion by either the Court or opposing parties. Hence it must be read and interpreted in that posture and *in the light of the plain meaning of the words* chosen by respective counsel [fol. 173] *with due regard to the knowledge of the same counsel as to their respective theories of the case.*

It is plaintiffs' theory of the case, with which the Court is in agreement, that they may sustain their cause of action on two basic grounds—first on the basis of the defendants' wrongs done before and independent of Governor Fine's veto of S. B. 615, and that it is to redress those wrongs that this suit is brought; within that group counsel includes increased expense of operation, the loss of business and the like; secondly, that they have been injured by the fomentation of restrictive legislation, and the attempts at such, in all of the states referred to in the findings of fact. Plaintiffs, then properly conclude that their case with reference to ground one is without the protection of the *Fletcher v. Peck* type of case because such activities constitute something far and beyond mere legislation enacted in pursuance of a plan to monopolize. They then further conclude that they may also sustain their claim on the basis of the above-referred to fomentation of legislation in that it is the *attempt to influence such and the overt acts carried out in pursuance of that illegal purpose* that constitute the wrong; and the fact that some segment of the material used might not have been distorted or that it may not have actually succeeded in influencing either legislative or executive acts is immaterial. Hence, plaintiffs contend there is no need to inquire into either the legislative or executive motives to sustain their claim—first, because the activities other than legislative ones sufficiently make out their case, and secondly, because the attempts to secure such legislation and

the overt acts in pursuance of a plan to monopolize are sufficient to again sustain the cause of action independent of the real reasons for the legislative or executive acts. Again, the Court is in agreement and has sustained the cause of action on those grounds and also has found that such activity individually and/or jointly resulted in injury (fact of injury) to the plaintiffs. However, the plaintiffs seek to carry over this theory of the case into an ascertainment of actual damages caused to the individual [fol. 174] plaintiffs other than PMTA by the so-called legislative program. This the Court cannot do because the presence of the stipulation in question prevents a continuation of the application of plaintiffs' theory to a finding of actual damages flowing to the plaintiffs other than PMTA. Restated, the stipulation is as follows:

> "3. The *only* damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law of 1955." (Emphasis supplied)

There is but one logical interpretation of the words contained therein in the light of the circumstances, and that is that the damages claimed are those resulting as a proximate cause of Governor Fine's veto of S. B. 615. Further, it is clear, and has been already stated, that the stipulation in question is limited in its application to the determination of the *amount* of actual damages and has no application with respect to the *fact* of damages and injunctive relief. For that reason it has no bearing on the plaintiffs' ability to sustain their cause of action. However, the only valid interpretation of the language insofar as the *amount* of actual damage is concerned is that plaintiffs have excluded any consideration of damages flowing from the loss of good will to these plaintiffs which resulted directly from the defendants' campaign. Accordingly, they have specifically limited themselves to those damages proximately flowing from the veto of S. B. 615. The Court under the decided cases cannot award money damages for injuries proximately

resulting from a duly promulgated executive act. The basis of recovery in antitrust suits is set forth by Judge Maris in the case of *Gordon* v. *Loew's*, et al., F. 2d (3rd Cir. 1957), as follows:

> "* * * the person injured by reason of action forbidden by the antitrust laws recovers the measure of the injury to his business or property and by statutory di- [fol. 175] rection is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the defendant must pay an amount three times that base."

Unfortunately, these plaintiffs are without a base. *Darden* v. *Besser*, *supra*. The damages flowing from the loss of good will other than nominal ones have been excluded, and the damages proximately flowing from an executive act are unobtainable. Hence, the Court will grant nominal damages in the sum of six cents (6¢) to each of these plaintiffs and, of course, as stated, include them within the protected group being accorded injunctive relief.

## D.

## Summary of Relief.

1. Injunctive relief is granted to all plaintiffs and is to run against the ERPC and all corporate defendants, including Byoir, but will exclude the individual defendants. Proposed decree will be submitted by plaintiffs as previously stated.

2. Reasonable attorney's fee and costs shall be awarded to the PMTA, and such fee and cost shall run against all corporate defendants, including Byoir, according to the ratio as set out in the succeeding paragraph. ERPC and the individual defendants shall be excluded.

3. Damages shall be awarded to the PMTA for the loss occasioned by the expenditures required because of the defendants' campaign of destruction of good will, and

as determined, trebled. Eighty percent (80%) of such damages shall be assessed against the corporate defendants other than Byoir in the manner noted, and twenty percent (20%) against Byoir, which 20% shall not be reimbursed by ERPC nor by any defendant railroad or railroads. No damages shall be assessed against the individual defendants and ERPC.

[fol. 176] 4. Nominal damages in the amount of six cents (6¢), to be trebled as provided by statute, shall be granted to each and every plaintiff other than PMTA and shall be assessed in the same manner as the damages flowing to the PMTA.

5. Testimony and evidence with respect to the attorney's fees, costs, and the damages flowing to the PMTA shall be heard at a future date to be determined by the Court.

## Evidentiary Rulings.

Because of the magnitude and importance of the case the Court permitted great latitude in the introduction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence; *U. S.* v. *General Motors*, 121 F. 2d 376 (7th Cir. 1941), cert. denied, 314 U. S. 618 (1941); *Kansas City Star Company* v. *U. S.*, 240 F. 2d 643 (1957). The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendants, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the whole of the northeastern part of the United States. Because the plaintiffs limited themselves to proof of damages only within

the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow. As stated by Judge Vogel in the case of *Kansas City Star Company v. U. S., supra*, at pages 650 and 651: parties have always been allowed to "introduce evidence of other acts and doings of the party, of a kindred character, in order to [fol. 177] illustrate or establish his intent or motive in the particular act directly in judgment." And at page 651 is this pertinent language:

> "In order to show intent, it was entirely proper to receive evidence of a course of conduct engaged in by the appellants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the appellants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. But we need not use a rationale to explain this state of the law. The federal courts in anti-trust cases have long admitted evidence of conduct prior to the statutory period. Standard Oil Co. v. United States, 1911, 221 U. S. 1, 75-76, 31 S. Ct. 502, 55 L. Ed. 619; United States v. Pullman Co., supra; American Tobacco Co. v. United States, 6 Cir., 1944, 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575."

The objection taken to the introduction of this evidence is therefore without merits

The second category relates to the offer by the defendants of statements made by public officials as to the damages caused to highways and roads by the use of the heavy truck. The Court feels that that matter was properly handled on the record; the Court holding that while the offers had some probative value, and a few such statements were actually admitted in evidence, that it would unduly burden an already extensive record by the introduction of any further documents of that nature. There was extensive scientific evidence in connection with the Maryland Road Test and other general testimony to fully cover that point.

The third question arose from the admission of testimony of the acts of the conspirators occurring after the veto by Governor Fine of S. B. 615. Again the defendants attempted to limit the proofs of conspiracy to the time [fol. 178] within which plaintiffs alleged the activities of defendants had been the cause of actual monetary damages occasioned by the veto. The evidence received as to post-veto activities was relevant evidence and admissible, if not for any other purpose, at least to establish the need for injunctive relief against the continuing activities of the defendants against the plaintiffs, which activities the Court has now declared to have been illegal. It was also relevant to show the extent of the activities of the defendants in their campaign or, in other words, to round out a true picture of the full scope of the details of the conspiracy.

The fourth question relates to the interpretation of the stipulation by Byoir referring to the authenticity and source of documents obtained from the Byoir files. It is felt also that the ruling of the Court thereon at page 2225 fully covers the question there raised. (Also see R. 122, 123, 356-362a, 528, 529, 616, 617, 622, 633, 2214-2218, 2564, 2568).

Another question which was present throughout this case was that of venue and service of process upon the Eastern Railroad Presidents Conference as an unincorporated association. From all of the evidence the Court has concluded that the activities of the association within the State of Pennsylvania were such as to justify the finding which the Court now makes that ERPC was doing business within the Commonwealth of Pennsylvania and in the Eastern District thereof sufficient to establish venue in the Court. Service upon Mr. Franklin, the then president of the Pennsylvania Railroad and a ranking member of the Conference, constituted service upon the Conference. Compare these conclusions with *Noerr Motor Freight, Inc.* v. *ERPC*, 113 F. Supp. 737, 745, 746 (E. D. Pa. 1953). Over and above that, and with the Conference fully aware that the question of venue and jurisdiction was to be determined at trial, the Conference itself joined in the filing of the counterclaim against the plaintiffs. By such action the

Conference thereby waived any objections which it might [fol. 179] have to venue or jurisdiction over the person of the association. *Freeman* v. *Bee Machine Company*, 319 U. S. 448, 453, 454 (1943); *Merchants Heat and L. Company* v. *Cloe & Sons*; 204 U. S. 286 (1907).

The final group of offers of evidence related to statistics covering the basic construction of roads in the northeastern section of the United States; the use given such roads by the trucks using the highways in interstate commerce; the amount of destruction caused by such trucks, including certain specific instances in different sections of the country; the increasing cost of maintenance; the increasing cost of construction of roads and with particular reference to the changing geometric designs of the roads, all said to be caused by the increasing size of trucks and the greater weight of trucks. The defendants offered to prove by the use of experts in the highway and traffic fields that in the opinion of the experts the trucks did not pay their fair share of the cost of the foregoing and that thereby the trucking industry was receiving enormous subsidies at the hands of the taxpaying public. In the offer of proof it was averred that these experts would testify that should the trucking industry pay what in the opinion of the experts were, fair "user charges", the cost of operation of the trucking industry would immediately rise some 4% to 6%. This entire line of testimony was excluded by the Trial Judge for many reasons among which are: (1) There was ample proof in the record that heavy trucks, along with other factors, do constitute *one* of the main causes in the breaking up and deterioration of the already constructed highways; (2) that such proofs would not justify or be a defense to the railroad-Byoir combination to destroy the trucking industry as such. Again, it may be remarked that this is not a suit between either the United States or any State against the trucking industry itself. In such a suit the question of public welfare would undoubtedly play a large part. The railroads throughout this case have attempted to label themselves as the guardians of the public welfare. [fol. 180] They attempted to convince the Court that it should so consider the railroads in their activities against the truckers. The answer to that proposition is self-evident.

The railroads assisted by Byoir inaugurated and carried out their campaign to effectively limit and if possible destroy the trucking industry as a competitive factor in the long-haul transportation industry to preserve and increase their dollar volume of business; (3) there was ample evidence heard by the Court, sitting as a jury, with respect to these factors in connection with the highly scientific evidence surrounding the Maryland Road Test, in addition to the extensive evidence heard on these and analogous subjects when the defendants presented their proofs concerning the Pennsylvania situation. In that posture, and in the light of the entire record, the probative value of the evidence would not have warranted the time that would have been expended in further burdening an already lengthy record.

The Court, therefore, is of the opinion on a review of the entire case that the rulings made are consistent with the rules of evidence applicable in the Courts of the United States.

RULINGS ON REQUESTS.

The Court will now proceed to rule upon plaintiffs' and defendants' requests for findings of fact and conclusions of law. These requests in each instance will be "affirmed", "denied", or "refused as stated". In passing upon these requests the Court has found many of the defendants' requests, which while they contain substantially accurat statements of some of the facts established at the trial, nevertheless, attempt to link the activities of Charnay, after he was employed to offset the railroad activities, with isolated instances of defensive actions of the truckers prior to Byoir's entrance into Pennsylvania in the year 1951. By so doing they attempt to show a conspiracy of the truckers against the railroads. In this respect their proofs fail to convince the Court. I find no connection between [fol. 181] the isolated defensive actions by the defendants prior to Byoir's entry into Pennsylvania and the formal Pennsylvania defensive campaign initiated by Charnay after the truckers realized what the railroads had been doing. Since I have found that the truckers were not en-

gaged in a conspiracy against the railroads in violation of the antitrust statutes, such requests cannot be affirmed.

The following plaintiffs' Requests for Findings of Fact are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 58, 59, 60.

Request No. 16 is modified by the deletion in line three of the words "and thereby procuring legislation", and the insertion after "public opinion" in line three of the following phrase: "Hostile to the trucking industry thereby destroying its good will with the public and thereafter attempt to secure legislation"; and as so modified is AFFIRMED.

Request No. 28 is modified by the insertion of the following sentence at line eleven after the words "Harpers, October, 195_": "With regard to the last named article defendants furnished for the use of the author extensive research material only and had no part in either the writing or editing of said article"; and as so modified is AFFIRMED.

Request No. 30 is REFUSED AS STATED.

Request No. 38 is modified by the deletion at line five of the words "because of its inaccuracy" and the insertion of the words "because it was in a final report"; and as so modified is AFFIRMED.

Request No. 40 is modified by the deletion at line five of the words "and are still" and the insertion of the words "and even after the veto of S. B. 615 were still"; and as so modified is AFFIRMED.

Requests Nos. 52, 53 and 54 are DENIED.

[fol. 182] Request No. 57 subparagraphs (a), (b) and (d) are REFUSED AS STATED.

Request No. 57 subparagraphs (c), (e) and (f) are AFFIRMED.

The following plaintiffs' Requests for Conclusions of Law are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 16, 17, 18.

Request No. 10 with the insertion before the words "the means" in line one of the words "one of"; and as so modified is AFFIRMED.

The following plaintiffs' Requests for Conclusions of Law are DENIED:

Nos. 7, 14 and 15.

The following defendants' Requests with respect to plaintiffs' case are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 29, 31, 32, 37, 39, 44, 46, 47, 48, 50, 51, 52, 53, 56, 57, 59, 60, 62, 63, 64, 65, 66, 70, 74.

Request No. 22 with the addition of the words "as public relations counsel to put the projected railroad campaign into effect" after the word "retained" at the end of line four; and as so modified is AFFIRMED.

Request No. 30 with the deletion of the words "in the matter of rates" at lines three and four; and as so modified is AFFIRMED.

Request No. 35 with the deletion of the words "who would be able to counteract PMTA publicity" at lines seventeen and eighteen, and the insertion in lieu thereof the words "to assist that group in carrying out defendants' program already in operation"; and as so modified is AFFIRMED.

Request No. 49 with the deletion of the words "to be issued as a press release" in lines fourteen and fifteen and [fol. 183] the insertions in lieu thereof of the words "for discussion"; and as so modified is AFFIRMED.

Request No. 55 with the addition of the phrase at the end thereof: "and was so treated and regarded by the Bureau of Public Roads"; and as so modified is AFFIRMED.

Request No. 67 with the addition of the following sentence at the end thereof: "The memorandum was based partly upon questionable statistics furnished the department by Marine of Byoir on behalf of the railroads."

The following defendants' Requests for Findings of Fact with respect to the plaintiffs' case are REFUSED AS STATED:

Nos. 14, 17, 18, 27, 40, 41, 45, 54, 68, 69, 71, 73.

The following defendants' Requests for Findings of Fact are DENIED:

Nos. 13, 15, 16, 19, 20, 21, 23, 24, 25, 26, 28, 33, 34, 36, 38, 42, 43, 58, 61, 72, 75, 76, 77, 78, 79, 80, 81, [illegible].

The following defendants' Requests for Conclusions of Law with respect to plaintiffs' case are REFUSED AS STATED:

Nos. IV and V.

The following defendants' Requests for Conclusions of Law with respect to plaintiffs' case are DENIED:

Nos. I, II, III, VI, VII, VIII, IX.

The following defendants' Requests for Findings of Fact in relation to defendants' counterclaim against plaintiffs are AFFIRMED:

Nos. 1c, 2c, 3c, 4c, 5c, 6c, 7c, 8c, 10c, 11c, 12c, 13c, 14c, 15c, 16c, 17c, 18c, 20c, 25c, 26c, 27c, 29c, 31c, 32c, 33c, 35c, 36c, 37c, 38c, 39c, 41c, 42c, 43c, 48c, 54c, 72c, 73c, 75c, 76c, 82c, 83c, 84c, 85c, 86c, 87c, 89c, 90c, 91c, 92c, 93c, 94c, 96c, 97c, 98c, 99c, 100c, 101c, 102c, 104c, 106c, 107c, 108c, 109c, 110c, 111c, 112c, 113c, 114c, 115c, 116c, 117c, 118c, 119c, 120c, 121c, 122c, 123c, 124c, 125c, 126c, 142c, 144c, 145c, 146c, 147c, [fol. 184] 148c, 149c, 151c, 152c, 153c, 154c, 155c, 156c, 157c, 158c, 159c, 162c.

Request No. 24c with the addition of the following sentence at the end thereof: "The cost of financing the present action was included in the above stated sums."; and as so modified is AFFIRMED.

Request No. 28c with the addition of the following sentence at the end thereof: "The main purpose in the year 1952-1953 of solicitation of funds was to combat the railroad program against the truckers waged over the prior three-year period."; and as so modified is AFFIRMED.

Request No. 30c with the deletion of the words at lines three and four: "to mete out rewards and punishments to them"; and as so modified is AFFIRMED.

Request No. 40c with the deletion of the words at lines five and six: "thus enabling plaintiffs to divert business from counterclaimants."; and as so modified is AFFIRMED.

Request No. 44c with the deletion of the words at lines four and five: "in the matter of rates"; and as so modified is AFFIRMED.

Request No. 57c with the addition of the following sentence at the end thereof: "This action was taken by the plaintiffs after the discovery and expose of the railroad-Byoir campaign against the truckers."; and as so modified is AFFIRMED.

Request No. 143c with the addition of the following sentence at the end thereof: "All such attempts were subsequent to the railroad-Byoir antitruck campaign."; and as so modified is AFFIRMED.

Request No. 150c with the addition of the following sentence at the end thereof: "This attempt to secure criticism of road tests occurred after the Byoir connection with the Maryland Road Test and the antitruck campaigns in [fol. 185] Ohio and Pennsylvania on behalf of the railroads by Byoir had been revealed to the truckers."; and as so modified is AFFIRMED.

The following defendants' Requests with respect to the counterclaim are REFUSED AS STATED:

Nos. 21c, 22c, 34c, 46c, 47c, 49c, 50c, 52c, 53c, 55c, 56c, 58c, 59c, 60c, 61c, 62c, 63c, 64c, 65c, 66c, 70c, 71c, 74c, 78c, 79c, 80c, 81c, 95c, 103c, 105c, 127c, 128c, 129c, 130c, 131c, 132c, 133c, 134c, 135c, 136c, 137c, 138c, 160c, 161c.

The following defendants' Requests with respect to the counterclaim are DENIED.

Nos. 9c, 19c, 23c, 45c, 51c, 67c, 68c, 69c, 77c, 88c, 139c, 140c, 141c, 163c, 164c, 165c, 166c, 167c.

Defendants' Request for Conclusions of Law No. Ic is AFFIRMED.

Defendants' Requests for Conclusions of Law Nos. IIc, IIIc, IVc, and Vc are DENIED.

Two further sets of requests for findings of fact and conclusions of law have been submitted for consideration by the Court. The first are plaintiffs' requests for findings in opposition to defendants' counterclaim, and the second are requests for findings submitted by certain individual defendants enumerated in paragraph 6 under the heading "Defenses". All of these requests have been considered by the Court and since the Court is of the opinion that it has fully covered the first set of requests under the heading "Counterclaims" and the second set of requests in paragraph 6 under the heading "Defenses", these requests will not be specifically answered.

To the extent that the language of any of the requests which have been affirmed by the Court may be inconsistent with the narrative findings of fact and conclusions of law made by the Trial Judge in the course of this opinion, the language of the opinion shall prevail.

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[fol. 186]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FINAL DECREE—July 22, 1958

This cause having been tried before the Court without a jury, the Court having determined upon consideration of the record that the plaintiffs are entitled to damages and injunctive relief against the Eastern Railroad Presidents Conference and all corporate defendants, and the Court having filed its Opinion to that effect herein on October 10, 1957;

Now, Therefore, after hearing plaintiffs and defendants by their attorneys, it is hereby

Ordered, Adjudged and Decreed as follows, as to

I.

## INJUNCTIVE RELIEF

(A) "Plaintiffs" means the following parties plaintiff, their successors and assigns:

Noerr Motor Freight, Inc.
Kramer Bros. Freight Lines, Inc.
McLean Trucking Company
Lansdale Transportation Co., Inc.
T. M. Zimmerman Company
W. I. Womeldorf & Sons Company
Rodgers Motor Lines, Inc.
Akers Motor Lines, Inc.
Keystone Lawrence Transfer & Storage Company
W. J. McCormick Truck Transportation
Martin Brothers
Pennsylvania Transfer Company
F. W. Lusk Transfer Company
Davidson Transfer & Storage Company
Suwak Trucking Company
C. W. Dillie
[fol. 187] A. W. Bauman, Jr. Trucking Company
Martsolf Bros.
Spector Motor Service, Inc.
G. C. Braden Trucking Company
Edward G. Horn Trucking Co.
Seaboard Tank Lines, Inc.
Friedman's Express, Inc.
Karn's Transfer, Inc.
Lombard Bros. Incorporated
Lester C. Newton Trucking Company
Pennsylvania Motor Truck Association (PMTA),
Plaintiffs.

D. F. Bast
Ed. Chadderton Trucking
Cooper-Jarrett, Inc.
Eastern Freight-Ways, Inc.
Fowler & Williams, Inc.
William F. Crossett, Inc.

Fischbach Trucking Co.
Hall's Motor Transit Co.
Mushroom Transportation Co., Inc.
Miller Motor Express, Inc.
Yale Transport Corporation
Daily Motor Express
McCullough Transfer Co.
York Transportation Co.,

Intervening Plaintiffs.

Other members of plaintiff PMTA
engaged in long-haul trucking

(B) "Defendants" means the following parties defendant, their successors and assigns:

Eastern Railroad Presidents Conference
Pennsylvania Railroad Company
New York Central Railroad Company
[fol. 188] Chesapeake & Ohio Railway Company
Norfolk & Western Railway Company
Baltimore & Ohio Railroad Company
Reading Company
New York, New Haven & Hartford Railroad Co.
Lehigh Valley Railroad Company
Lehigh & New England Railroad Company
Delaware, Lackawanna & Western Railroad Co.
Delaware & Hudson Railroad
Erie Railroad Company
Western Maryland Railway
Pittsburgh & West Virginia Railway
New York, Chicago & St. Louis Railroad Co.
Boston & Maine Railroad
Central Railroad Company of New Jersey
Central Railroad Company of Pennsylvania
Maine Central Railroad Company
New York, Ontario & Western Railway
Lehigh & Hudson River Railroad
Union Railroad Company (Pittsburgh)
Canadian Pacific Railway Company
Canadian National Railways
Carl Byoir & Associates, Inc.,

Defendants.

(C) "Person" means any individual, corporation, partnership, association, or other business or legal entity.

II

The provisions of this Final Injunction applicable to and defendant shall apply to such defendant, its officers, agents, servants, employees and attorneys, and to all other persons acting or claiming to act under, through, or for such defendant, who shall have received actual notice of this Final Injunction by personal service or otherwise.

[fol. 189]

III.

Defendants have violated Sections 1 and 2 of the Act of Congress, of July 2, 1890, 15 U. S. C., Sections 1 and 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act. Said violations have consisted of defendants' engaging in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce among the several states and in an unlawful combination and conspiracy to monopolize trade and commerce among the several states, with the intent and object of substantially lessening competition in and monopolizing the long-haul transportation of freight, to the irreparable injury of the public and of the plaintiffs, whose business defendants intended to restrain and restrict to the greatest extent possible, with the ultimate object of driving them out of the long-haul transportation industry. Defendants have sought to achieve this object primarily by campaigns of vilification and harassment designed to destroy the business good will of the long-haul truckers, including plaintiffs, and to cause to be imposed upon them burdensome governmental restrictions and taxes. Defendants have concealed their part in instigating and supporting such campaigns.

IV.

(A) Defendants are jointly and severally enjoined and restrained from combining or conspiring with the intent and object of restraining, restricting, limiting or preventing the existence, growth, development, or expansion of the

business of plaintiffs, or competition by plaintiffs with defendants, or any of them, in the long-haul transportation of freight, by directly or indirectly doing or causing to be done any of the following acts:

(1) Seeking to create resentment or hostility to plaintiffs in the minds of the general public.

[fol. 190] (2) Seeking to create resentment or hostility to plaintiffs in the minds of those persons who utilize or may utilize the services of plaintiffs' trucks and in such a manner as to interfere with business relations between shippers and plaintiffs.

(3) Seeking to create resentment or hostility to plaintiffs in the minds of legislators, law enforcement officers, or other public officials or members of any branch of government.

(4) Publishing or causing the publication or dissemination of false, defamatory or derogatory material with regard to plaintiffs or their business.

(5) Instigating, preparing, composing, publishing, producing, disseminating, paying for or subsidizing any release, article, report, statistics or other publication, or any motion picture, radio or television presentation, or any other material relating to plaintiffs or their business without disclosing to the reader or viewer that it has been instigated, prepared, composed, published, disseminated, produced, paid for or subsidized by or on behalf of defendants.

(6) Seeking out or creating organizations apparently independent of defendants to carry out any activity prohibited by this Final Injunction without publicly disclosing the relationship between defendants and such organizations.

(7) Employing or contracting with any public relations firm or similar organization to carry out or cause to be carried out any activity prohibited by this Final Injunction.

(8) Making payments, whether by way of salary, expenses, or of any other nature, to any official, officer, employee or consultant of any governmental, public or private body or organization to carry out, in the name of such

person, governmental, public or private body or organization, any activity prohibited by this Final Injunction.

(9) Sponsoring, instigating or supporting any legislation for the enactment of ton-mile, weight-distance, high-[fol. 191] way or other taxes of any kind to be levied on plaintiffs or their business, or weight, size or other truck limitations, or opposing legislation repealing such existing taxes or truck limitations, unless such opposition be openly and publicly made in the name of the defendants or any of them.

(B) Activities affecting plaintiffs prohibited herein in this Paragraph IV shall be deemed to include (1) those activities specifically directed against plaintiffs by name, and (2) those generally directed against long-haul truckers as a group or against other specific persons in the long-haul trucking business in so far as they affect plaintiffs because they affect the group (long-haul truckers) of which plaintiffs are a part.

## V.

Nothing contained in this Final Injunction shall be construed to prohibit defendants from seeking to change or improve their own facilities, services or rates to make such facilities, services or rates more attractive to shippers, nor from seeking legislative, administrative or other governmental benefits for themselves, as distinguished from imposing burdens on plaintiffs. Nor shall anything contained in this Final Injunction be construed to prohibit defendants from appearing before any legislative, administrative or other governmental body to point out the effect upon the railroad industry of the enactment of any legislation or administrative rulings which may be designed to aid the plaintiffs, but which would adversely affect the defendants.

## VI.

Jurisdiction of this cause is retained for the purpose of enabling any party in interest to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this injunction, for the purpose of the enforcement

[fol. 192] of compliance therewith and for the punishment of violations thereof.

VII.

It is hereby Further Ordered, Adjudged and Decreed as to

Damages.

that judgment be entered in favor of plaintiff Pennsylvania Motor Truck Association (PMTA) and against all the defendants, jointly and severally, in the amount of $652,074.00 (single damages $217,358.00—trebled, as required by statute).

Further, that judgment be entered in favor of all the named plaintiffs in Paragraph I (A) of this Final Decree, other than Pennsylvania Motor Truck Association (PMTA), and against all the defendants, jointly and severally, in the amount of eighteen cents (18¢) each (nominal damages of six cents (6¢) each—trebled, as required by statute).

VIII.

It is hereby also Further Ordered, Adjudged and Decreed, as to

Counsel Fee.

that the defendants pay to plaintiff Pennsylvania Motor Truck Association (PMTA) as a reasonable counsel fee, under the provisions of Section 15, Title 15 U. S. C. A., the sum of Two Hundred Thousand ($200,000.00) Dollars.

By the Court:

Thomas J. Clary, *J.*

Dated at Philadelphia, Pennsylvania this 22nd day of July, 1958.

[fol. 192a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 192b] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,751

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NOERR MOTOR FREIGHT, INC., et al.,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Appellants.

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Appeal From the Orders of the United States District Court for the Eastern District of Pennsylvania, Dated July 22, 1958 and July 31, 1958.

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**Appellees' Appendix—Filed February 24, 1959**

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[fol. 193]

IN UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

**Transcript of Proceedings**

REYNOLDS GIRDLER.

Direct examination.

By Mr. Kohn:

Q. Mr. Girdler, by whom were you employed during the period 1949 to 1952?

A. By Carl Byoir & Associates.

Q. In what capacity?

A. As an account executive on the Eastern Railroad Transportation Committee account.

Q. What are the duties of an account executive?

A. General supervision of the account, maintenance of liaison with the client, carrying out of the work assigned by the client, duties expected of you, and general supervision of the account.

Q. For all practical purposes you are the manager of that account?

A. Yes, sir.

Q. And you are in charge of it with the exception of whatever consultation you may see fit to have with only, really, the two top officers of the company, Mr. Byoir and Mr. Swinehart; isn't that right?

A. And Mr. Hammond.

Q. He was vice-president?

A. Yes, sir.

Q. But you had this segment of the business under your control?

A. That's right.

* * * * * * *

[fol. 194] Q. Mr. Girdler, was it your undertaking that the policy which you, your company working for the other defendants here was to promulgate as the ideal or desirable national transportation policy, was air lines for speed, trucks for short hauls and railroads for long hauls. That is what you were hired to do?

The Court: You may answer it.

The Witness: Thank you.

Within the limits of the abbreviated, necessarily abbreviated line here, yes, sir.

By Mr. Kohn:

Q. Now, you state on the second page of this document:

> "The railroads can haul 100,000 tons of freight from coast to coast at a cost of 3,500 man-days of labor. It takes 90,000 man-days to do the job by truck and 50,000 man-days by plane."

Was that information correct?

A. Certainly at the time that I wrote it I assumed it to be correct, because I am sure that it was obtained from sources that I believed to be reliable.

Q. And do you now believe that that was correct?

A. I have no, in the intervening years I have had no reason to see anything which would dispute it. I am not an expert at the moment, or even then.

Q. But as far as you know, that information is accurate and you would be willing to stand by it?

A. As far as I knew, yes, sir. It was obtained from some basic document that we had at hand at the time.

Q. And when I say you I mean Byoir.

A. Yes, sir. We all looked at the material on the account, that is.

Q. I call your attention to the bottom of page 6. Is it correct that you as account executive responsible for this account at Byoir stated:

> "You can see from the foregoing that this account is utterly unlike the conventional one. Here we do not [fol. 195] have a client for attribution. Of course, we will release some stories under client attribution, but they will be of lesser propaganda importance than those we can generate from motorists, property owners, taxpayer, farmer or women's groups. In sum, we not only have to create publicity ideas; we also have to go out in the field and create the groups and occasions so that those publicity ideas will become realities."

And you so stated to your associates and department heads at or about the time you began to work on this account?

A. That is right.

Q. Then I call your attention to the third paragraph on page 7 and ask you if that correctly states your instructions.

> "One more word: If you are asked about the nature of our work for the railroads, you need only say that we are trying to develop a public relations program to speed the adoption of a more modern, enlightened national transportation policy as already defined by Congress and two presidents."

A. Yes, sir.

• • • • • • •

Q. Now, do you recall those were covering letters, were they not, in which you sent out Exhibit 24, the statement of objectives about which we were talking this morning before lunch, and you state as follows:

> "At the suggestion of Mr. Thomas J. Deegan, Jr., Chairman of the Public Relations Committee of the Eastern Railroad President Conference—Transportation Committee, we are attaching a copy of the brief memorandum prepared for the guidance of the department heads of Carl Byoir & Associates, Inc.
>
> "Since the memorandum was prepared for internal consumption only and was confidential to our department heads, it is somewhat informal in tone. However, [fol. 196] we hope it will give you a better idea of the task for which we have been retained and of our proposed methods for carrying out that task."

Now, do you recall letters similar to this were sent to all of the railroad presidents, and as a matter of fact, as appears from the letters to Ross and Littlefield, to the assistants and public relations people who participated in the Eastern Railroad Presidents Conference meeting and this program with the presidents?

A. (Witness nodding)

Q. Would you please say yes or no?

A. Yes.

Q. It is hard for the reporter to catch it otherwise.

A. Oh, I am sorry. Yes.

Q. Now, you had a pretty good response, didn't you, to these letters?

A. I can't remember whether I did or not. I think I got a few—I can remember getting a few letters back commenting on it, but how many really I don't know, Mr. Kohn.

Q. Well, let's just take one. Do you know Mr. Franklin, who he is?

A. I know who he is, yes, sir.

Q. Who is he or was he?

A. At that time he was the president of the Pennsylvania Railroad.

Q. An active member of the Conference?

A. Yes, sir.

. . . . . .

Mr. Kohn: Would you please mark with the next number, P-26, a 2-page letter from the Pennsylvania Railroad Company to Mr. Girdler dated October 6, 1949.

By Mr. Kohn:

Q. That is Mr. Walter S. Franklin, the president on October 6, 1949, of the Pennsylvania Railroad?

A. Yes, sir.

[fol. 197] Q. This is a letter to Mr. Reynolds Girdler of Carl Byoir on the stationery of the Pennsylvania Railroad Company, signed by Mr. Franklin, the president himself, dated October 6, 1949.

Incidentally, I note that although he was in Washington at the time he felt sufficiently important to reply to you that he replied from Washington, D. C. instead of from his regular office here in the Broad Street Station Building; is that correct?

A. Well, it is a point that certainly I missed at the time.

Q. Well, look at it.

A. Yes, yes, yes.

Q. And he said—

A. That is the first time I recognized that.

Q.

"I have read with interest the memorandum attached to your letter of October 4. While you have touched upon enforcement of the law covering speed, weight restrictions, etc., as applicable to the big trucks, I do not think you have emphasized this phase"—

And he wrote in the word "in" in his own handwriting, didn't he?

"—in what I hope may be covered by your publicity release—to the extent that it is justified.

"It has only been within the last few months that any attempt has been made to enforce weight regulations. Excessive weights have greatly added to the damage of roads. In certain states trucks are only allowed a speed of 30 miles per hour. Truck owners

will confirm the fact that their drivers do not pay the slightest attention to this restriction, and your experience on the highways will also confirm this. When and as you approach the remedies, I think you should emphasize that many truckers are perfectly willing to pay fine of $50 for excess weight, and do so whenever they have been stopped. The excess revenue more than [fol. 198] justifies the small fines which, from a practical standpoint, are ignored.

"If the loading of excess weights is to be stopped, fines will have to be increased, but it would be far better to follow the usual practice applied to drivers licenses, that is, where there is more than one offense, to suspend the truck license for a period of a month or more. The suspension of the driver's license would be similar to the slight fine now applied, but a suspension of a truck license"—

And he underlines the words truck license

"—prevents that truck from operating in that state and would obviously materially reduce the earnings."

That is, the earnings of the trucker.

"We are very much interested in the progress of your efforts, and I hope that these suggestions may be given consideration."

Now, do I understand from this letter that it was your understanding at that time that Mr. Franklin, on behalf of the Pennsylvania Railroad, approved the objectives as embodied in the memorandum and, in addition, had this other suggestion of his own to add?

Mr. Price: Objection.

A. Yes, sir, it was.

. . . . . .

Q. Who is Mr. Littlefield?

A. Mr. Littlefield was an employee of the Pennsylvania Railroad, and as I remember, he was a chairman of the Research Committee, which was one of the three committees to which we reported.

Q. In other words, he was the Pennsylvania Railroad representative on one of the subcommittees of the ERPC, to whom Byoir reported in the course of this project?

A. Yes, sir, yes, sir, that's right.

[fol. 199] Q. I note here on the letterhead that he was referred to on the railroad stationery as the general tax agent.

A. Yes.

Q. Now, Mr. Girdler, he says to you the following, does he not:

"Yours of October 4th."

And he is referring once again to the memorandum Exhibit P-24.

"Over the weekend, I read your memorandum to department heads and it is most refreshing. For fifteen years I have devoted more or less time to this subject, but rarely found anyone inside or outside of the railroad fraternity who had the time to seriously study all phases of this complicated problem."

Now, let me interrupt. Did you know that Mr. Littlefield during that 15 years was one of the witnesses before the Wheeler Committee whose report we referred to briefly when we were in court this morning?

A. No, sir, I did not.

Q. "Your overall approach is broad and constructive, and the following is not criticism but suggestions that may avoid complications later on:

"Page 2"—

And he quotes from your memorandum as follows:

" 'But they represented an outright gift to the trucking industry of free roadways over which they could do business at public expense.' "

And he says:

"The trucking industry will give you a pretty warm argument on this point inasmuch as they do pay a very

substantial amount in the form of motor vehicles taxes which are, as you know, earmarked for highways in 21 states. You have plenty of arguments to show that they are not paying their fair share of these highways [fol. 200] and are contributing, in many cases, nothing, and in other cases, very little, in the way of honest-to-goodness taxes for the general functions of government other than highways."

"Page 2"—

He quotes again from your memorandum:

"'But with the outbreak of war, as you all know, the trucking industry practically collapsed as a transportation agency.'"

He says:

"As a long-haul transportation agency it certainly did very nearly collapse. It was unable to take any part of the tremendously increased freight brought about by the war. However, I hope your staff will appreciate that there must be some difference between long-haul over-the-road trucking and short-haul trucking in local and municipal areas. The short-haul truck increased greatly during the war because here the truck could do a job better than any other form of transport. For example, we found that the convoys were going out light from New York because the floating conditions were such in New York harbor that we could not move the freight across the harbor fast enough. To remedy this, fleets of trucks were employed by all railroads to move large tonnage through the tunnels and avoid the floating problem. The Pennsylvania alone trucked as much as 100 carloads a day from the Jersey side to piers throughout greater New York."

Now, does that indicate to you that Mr. Littlefield was again making the point that we discussed this morning, that trucks were all right for short haul but they were not to be used for long haul?

A. Of course, both short haul and long haul are comparative terms, Mr. Kohn, and I don't know precisely what [fol. 201] he had in mind as a precise definition of short haul as compared to long haul.

Q. You used the term short haul and long haul too at your work, did you not?

A. Yes, sir.

Q. What does it mean to you, short haul and long haul?

A. Well, as I remember it, as a matter of fact, in some instances, obviously, 50 miles is a short haul, but in other instances 500 could also be an economic distance for a truck to run.

Q. Is that the best definition you can give us of the term short haul and long haul at this time?

A. Yes, sir.

Q. Well, is there any difference between the two in your mind, other than what you have just told us, that you can now tell us?

A. Any difference between—

Q. Between short haul and long haul?

A. No, sir. What I am trying to say is that they are both comparative terms, and depending upon the circumstances—I am no transportation expert—but depending upon the circumstances, a 500-mile trip by a truck might be an extremely efficient operation.

Q. Would it be fair to say that the circumstance which governs is that when the railroad thinks that it should or could carry the particular item it becomes long haul and if the railroad thinks it should not, then it is short haul?

A. I think that is a fair statement. I imagine the reverse is true from the other side.

Q. So that you understood Mr. Littlefield to be stating that a distinction should be based on the test to which we have just referred? I think that is clear, is it not?

(No answer.)

* * * * * * *

Redirect examination.

Q. Mr. Girdler, yesterday you were asked about Exhibit P-24 and you testified with regard to the paragraph in

[fol. 202] which it was stated, "Congress itself has declared the national policy . . ."

Do you remember that by Mr. Price? Do you see the paragraph I am referring to?

A. Yes, sir.

Q. Would you tell us, please, what was the policy declared by Congress?

A. The way I stated it at that time, and obviously the impression that I had as to the national policy as stated by Congress, and as set forth with particularity, as I recall, in a new book that the Brookings Institute had at that time issued on the question of national transportation, was summed up in very abbreviated form—assignment of that portion of the transportation burden to the agency best fitted for it, with equality of treatment for all, just as I stated it here.

Q. Is that the entire policy of Congress, or can you make it more specific?

A. Oh, no, sir. You certainly could not, in a thing like this, as simple and short and informal a memorandum as this was originally supposed to be, sum up the entire national transportation policy or describe it adequately in a few short sentences.

Q. Well, was it Congress' policy that the airlines be used for speed, that the trucks be used for short hauls, and the railroads for long hauls?

A. That was my impression of the national transportation—as I believe at that time—the last time it had been stated was sometime in 1944, once again within the abbreviated small space that was available for this sort of thing. It was a very short version of it, and certainly not adequate to all the nuances and fine distinctions which were treated a great deal more thoroughly, naturally, in this book.

Q. But, in essence, that was the Congressional policy, airlines for speed, trucks for short hauls, and railroads for long hauls?

[fol. 203] A. That was the impression that I was under at the time, certainly, yes, sir.

Q. And it was the purpose and object and intent of the defendants here to carry out that policy?

A. As we understood it, yes, sir.

Q. So that your efforts were then directed toward that end in this Eastern Railroad Presidents Conference project?

A. Yes, sir.

Q. And in doing the things you did, some of which you discussed, and in seeking the measures which you sought, such as the weight restrictions and the ton-mile tax and state taxes, and so on, you did those things, the defendants here did those things for the purpose of carrying out that purpose?

Mr. Price: That is objected to.

Mr. Rhoads: Objected to.

The Court: Read the question back, Mr. Bosta.

(Last question read.)

The Court: I will overrule the objection.

The Witness: These things were—

By Mr. Kohn:

Q. Well, I think you can answer it, if you will, please, yes or no, and then make any explanation you want.

A. Yes. Within the—with the realization that what we were seeking in our interpretation of the national transportation policy was equality of opportunity for the railroads, an equality which we did not believe they then enjoyed by reason of the subsidies which the railroads considered the truckers were obtaining."

. . . . . .

[fol. 204] C. COLBURN HARDY.

Direct examination.

By Mr. Kohn:

Q. Now, the second objective as stated there was read to you before as being to split the trucking industry by isolating long-haul trucks. Now, would you read the (a) and (b) under that heading.

A. Yes, sir.

"(a) By neutralizing industrial opposition through support from tax-conscious executives as opposed to traffic managers.

"(b) By building public support through all media: press, radio, speeches, and so forth."

Q. Now, going back to the heading to split the trucking industry by isolating long-haul truckers, what was the purpose of that?

A. As was reported in the tax policy report, the problem of New Jersey was that it is a bridge state, that a vast amount of the heavy-truck traffic on its highways comes from out of state and that these trucks do not then pay their fair share of the cost of the highways which they use. So in New Jersey it was a very difficult problem, as it is pointed out.

Now, the New Jersey trucks, however, and especially the coal truck and bakery truck, and the normal vehicle which we see, frequently did pay a substantial fee for its license plates and its gasoline, and those funds went into the general treasury, from which the money was taken to maintain and build the highways.

So there were, as this report strongly points out, two, almost two different segments of the trucking industry, and we wanted to point out the facts as told in this report.

Q. That is what you meant by isolating—

[fol. 205] A. Yes, sir.

Q. —the long-haul trucking industry and separating them from the other local trucking business?

A. Yes, sir.

• • • • • • •

WILLIAM WHITE.

Direct examination.

By Mr. Kohn:

Q. What is your full name?

A. William White.

Q. What are you doing now, Mr. White? What is your occupation? What job do you have?

A. I am president of the Delaware and Hudson Company and the Delaware and Hudson Railroad.

* * * * * * *

Q. How long have you held your position as president of the Delaware and Hudson?

A. Two years October 1.

Q. October 1, 1953?

A. 1954.

Q. What did you do before that?

A. I was president of the New York Central.

Q. How long were you president of the New York Central?

A. Slightly less than two years.

Q. What did you do before that?

A. I was president of the Delaware, Lackawanna & Western for eleven and a half years.

Q. These railroads are members of the Eastern Railroad Presidents Conference, are they not?

A. Yes.

[fol. 206] Q. And as their president you have been continuously a member of the Eastern Railroad Presidents Conference for approximately the last what, fifteen or sixteen years?

A. Since January 1, 1941.

* * * * * * *

Q. What was referred to by the Byoir people as the five percenters?

A. I don't know what the Byoir people referred to. I heard that 5 percenter thing the first time when I was being questioned by Mr. Dilworth three and a half years ago.

Q. Are you sure you didn't read it among the Saroyan papers some time before Mr. Dilworth questioned you?

A. If it was in the Saroyan papers, I just don't recall. But, certainly, the large trucks in long-haul freight traffic business didn't amount to more than about 5 per cent of the total of motor traffic on the highways. If you wish to refer to them as the 5 percenters, I am perfectly willing to term them 5 percenters so that there will be no confusion here in the record.

Q. I have no desire to refer to them as 5 percenters. The question was, didn't you recall that Byoir referred to them as 5 percenters.

A. Byoir may have.

Q. Well, weren't they the primary target of this first campaign or project with the Eastern Railroad Presidents Conference and Byoir?

A. Yes, I think so.

Q. And what you wanted to do was to get them subjected to higher taxes?

A. I have previously answered that question, Mr. Kohn, that we certainly thought, and we still think, that they should pay a higher user charge for the use of public facilities which they use for commercial enterprise.

Q. And that higher user charge would be a ton mile or weight distance tax; is that correct?

A. It may take that form, yes.

[fol. 207] Q. Well, it did take that form in New York, did it not, in 1951?

A. Yes, it did.

Q. And you and the Eastern Railroad Presidents Conference and Byoir played an active part in getting that tax enacted, did you not?

A. I think the answer to that is yes.

* * * * * * * *

THOMAS J. DEEGAN, JR.

Direct examination.

By Mr. Kohn:

Q. Mr. Deegan, by whom are you employed?
A. The New York Central System.
Q. And they are one of the defendants here?
A. Yes, sir.
Q. In what capacity are you employed by them?
A. I am vice-president, staff.
Q. I beg your pardon?
A. Vice-president, staff.
Q. How long have you been with the New York Central?
A. September 14, 1954.
Q. And with what railroad were you before that?
A. I was vice-president and a director of the Chesapeake & Ohio Railway Company.
Q. Vice-president there of what?
A. Passenger service and public relations.

• • • • • • •

Q. When did your contact with ERPC begin?
A. When I was an officer of the C & O.
Q. When was that?
A. Well, it began in 1949.
Q. June?
A. Yes, sir.

[fol. 208] Q. And what was your association with the ERPC at that time?

A. I was designated by the Conference as chairman of a subcommittee of the Competitive Transportation Committee, the Subcommittee on Public Relations.

Q. Was it one of your early duties to obtain the services of an outside public relations firm to carry out the objectives of the Transportation Committee?

A. Yes, sir.

• • • • • • •

Q. Was there any discussion among the members of your committee with regard to the subject of the campaign, the

program that you were then engaged in with Carl Byoir that we have been discussing here?

A. Yes, sir.

Q. And it related to the shortage of freight cars?

A. I believe, Mr. Kohn, if my recollection serves me rightly—and these documents written at the time may support it or vary from it—but as I recall it, the subject was, with a new war upon us, how should we view this whole matter in the light of the emergency? I think that is the net of it. It didn't specifically deal with shortage of cars, though I think that is an obvious point that occurs in any war.

Q. Well, the emergency that you refer to existed not only in 1950, but also continued through into 1951, did it not?

A. Yes, sir.

Q. And into '52?

A. Yes, sir.

Q. Now, do you recall that Mr. Selvage told you that the campaign was like duPont saying "We can't make all the nylon that is needed," but protesting against anyone else making it?

• • • • • • •

[fol. 209] A. I think in Jim Selvage's response to my memorandum to that Committee he gave that as an illustration, as one of his points, Mr. Kohn.

• • • • • • •

Q. I take it the net result, am I correct, Mr. Deegan, of this meeting at White Sulphur was that you did not abandon the campaign which the railroad was then waging but continued with it?

• • • • • • •

Q. If I may clarify it, the campaign that Mr. Selvage, Mr. Lyne, and yourself were talking about.

• • • • • • •

A. The public education campaign--

Mr. Kohn: Could you please answer yes or no—

The Witness: How can I answer yes or no? You have got it over a period of time here.

Mr. Kohn: Excuse me, let me finish.

(Continuing) and then make whatever explanation you want.

The Court: Are you going to restate the question?

By Mr. Kohn:

Q. Well, let's take in the ensuing six months.

A. There was no alteration in the campaign, as I recall.

Q. And the following year, 1950.

A. I believe not, sir.

---

[fol. 210] RAYMOND J. LITTLEFIELD.

Direct examination.

By Mr. Kohn:

Q. I show you a letter dated November 29, 1950, from you to Mr. Girdler of the Byoir organization, a copy going to Mr. Deegan, to which are attached two pages titled, "Comments on Speech of J. L. Snead, Jr.," which has been marked Exhibit P-249.

I call your attention to the last paragraph of the memorandum, in which you state, "There are so many phases of long-haul trucking that are basically unsound economically that the industry will grasp at any straw to befog the real issues."

Now, I take it at that time, November 29, 1950, it was your opinion that there were many phases of long-haul trucking that were basically unsound economically, is that correct?

A. May I look through this memorandum?

Q. Go right ahead.

A. Yes, sir, that was my views, but the words "industry" in the last line may not be quite clear, what industry I had in mind. I had in mind the trucking industry.

Q. I haven't asked you about it, but I thought it was obvious.

Now, I take it you were making the point that the finest coordination possible was long haul by rail and short haul by truck; is that right?

• • • • • • •

A. There was no question in my mind that the coordination, long haul by rail and short rail by truck, was a fine method of coordinating, yes, sir.

By Mr. Kohn:

Q. That, naturally, was the objective you sought, wasn't it, the finest coordination possible.

[fol. 211] A. I don't understand what you mean by objective we sought.

By Mr. Kohn:

Q. Weren't you interested in an economical transportation system for the nation?

A. Yes, sir.

Q. And this was the finest and most economical transportation system, was it not, long haul by rail plus the short haul by truck?

• • • • • • •

A. It was one of the desirable methods of transportation, but it wasn't the only one, by any means.

• • • • • • •

Q. I call your attention particularly to item No. 2, Mr. Littlefield, page 1 of the comments.

A. Yes, sir, I stated in the letter that the long haul by rail and short haul by truck was the finest coordination possible, yes, sir.

[fol. 212]

EXHIBIT P-11

INTER-OFFICE COMMUNICATION

CARL BYOIR & ASSOCIATES, INC.

TO: Gerry Swinehart
cc: Bill Hutchinson

DATE: June 6, 1952

FROM: Horace Lyon

SUBJECT:

You asked about our use of Mrs. Mott.

She is on retainer ($500 a month) for months of May and June *ONLY*—when the state and national Fed. of Women's Clubs and Bus. & Prof. Women's Clubs are holding their annual conventions, setting up next year's program plans, etc.—to do these things:

1. Get our program guide on the need for a modernized national transportation policy published with the endorsement of the Natl. Fed. of Women's Clubs.

2. Get transportation on the program agendas for next year (i.e.: next fall and winter).

We are getting results, and value, on both counts.

Reyn and I (had) (have) the understanding with Mrs. Mott that her performance during May and June would determine whether or not we used her services starting again in Nov. or Dec., etc. when the fight would get "hot".

Reyn cleared with Blosser on our use of Mrs. Mott these two months.

HLL

[fol. 213]

EXHIBIT P-23

May 13, 1952

To: Dick Strouse
cc: Muriel Fox, Bob Davis

From: Chan Hadlock

At belated last, this is confirmation of my understanding of our conversations concerning the desire of the account to utilize existing radio and television vehicles to portray truckers as evil, sinister wrong-doers.

Actually the proposed program fell into three categories. Not necessarily in order of importance—1) An effort by me to create and sell free-lance network radio and/or television scripts to existing dramatic programs with the trucking theme as basic plot, picturing the trucker as a law-breaker etc. As we discussed, invariably to conform with network requirements the "bad" truckers may have to be compensated for by "good" truckers, but the poison will still be there and the damage done. 2) We will make all possible efforts to enlist the aid of regular and free-lance writers to utilize the trucker as a heavy for shows they are writing or will be writing. Special emphasis will be placed on trying for a soap opera contact and such utilization. 3) We will merchandise as much as possible, some basic plot lines with truckers as the heavies, for use by an existing show, and/or regular or free-lance writer. Actually the final two points do overlap in some respects.

In connection with the first item, I have approached Leonard Blair, National Program Manager of ABC Radio, and he is considering a truck plot line for the ABC Radio dramatic series "Top Guy." I should hear from him within a couple of weeks.

In connection with the second item. I have approached two writers, one a very top TV scripter (Suspense, Danger etc.), and he has agreed to use some of our material as [fol. 214] plot bases. However, he brought up an important TV problem, which I know I will hear again, and which we briefly discussed. That is briefly, a truck script invariably

calls for some action outside. Since this is not practical live, it obviously calls for film, and this simple requirement might cause such scripts as we originate to be rejected. Therefore, as I understand it, there will be necessary means to offer film footage of considerable length which a TV producer could integrate into a cops-'n-truckers chase. This may be the property of the railroads, could be rented from stock footage houses, or shot to specification. But we can offer footage as an inducement and part of our cooperation. As you indicated the offer can appear to come from the Babbitt Alarm people.

And the last, a tougher nut to crack, I have nothing to report but may have some action on this in the future. Basically at the moment it's vital to get some plots worked out of the materials you have, and will give me.

As a sidebar on the project we did suggest that we look into the matter of securing the TV and/or radio adaptation rights for any novels (They Drive By Night, etc.), that picture truckers in the desired light.

We could then offer these gratis to some free-lance adapters, pitched for shows that require that the writers furnish cleared vehicles. This will undoubtedly take some time.

Check me on these things, and see if I'm correct in my understanding, and let me know what you think.

...CH...

[fol. 215]

EXHIBIT P-26

THE PENNSYLVANIA RAILROAD COMPANY
GENERAL OFFICE

Walter S. Franklin
President

Broad Street Station Building
1617 Pennsylvania Boulevard
Philadelphia 4, Pa.

At Washington, D. C.
October 6, 1949

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.
10 East 40th Street
New York 16, N. Y.

Dear Mr. Girdler:

I have read with interest the memorandum attached to your letter of October 4th.

While you have touched upon enforcement of the law covering speed, weight restrictions, etc., as applicable to the big trucks, I do not think you have emphasized this phase—in what I hope may be covered by your publicity release—to the extent that it is justified. It has only been within the last few months that any attempt has been made to enforce weight regulations. Excessive weights have greatly added to the damage of roads. In certain States trucks are only allowed a speed of 30 miles per hour. Truck owners will confirm the fact that their drivers do not pay the slightest attention to this restriction, and your experience on the highways will also confirm this.

When and as you approach the remedies, I think you should emphasize that many truckers are perfectly willing to pay fines of $50. for excess weight, and do so whenever they have been stopped. The excess revenue more than justifies the small fines, which, from a practical standpoint, are ignored.

[fol. 216] If the loading of excess weights is to be stopped, fines will have to be increased, but it would be far better to follow the usual practice applied to drivers licenses, that is, where there is more than one offense, to suspend the truck license for a period of a month or more. The suspension of the driver's license would be similar to the slight fine now applied, but the suspension of a truck license prevents that truck from operating in that State and would obviously materially reduce the earnings.

We are very much interested in the progress of your efforts, and I hope these suggestions may be given consideration.

Yours very truly,

W. S. FRANKLIN
President.

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[fol. 217]

EXHIBIT P-27

THE PENNSYLVANIA RAILROAD COMPANY
GENERAL OFFICE

R. J. Littlefield
General Tax Agent

D. H. Worrall
Tax Agent

E. E. Kinzel
Tax Agent

1767 Broad Street Station Building
Philadelphia 4, Pennsylvania

October 12, 1949

Mr. Reynolds Girdler, Vice Pres.
Carl Byoir & Associates, Inc.
10 E. 40th Street
New York 16, N. Y.

Dear Mr. Girdler:

Yours of October 4th.

Over the weekend, I read your memorandum to department heads and it is most refreshing. For fifteen years I have devoted more or less time to this subject, but rarely

found anyone inside or outside of the railroad fraternity who had the time to seriously study all phases of this complicated problem.

Your overall approach is broad and constructive, and the following is not criticism but suggestion that may avoid complications later on:

Page 2—"But they represented an outright gift to the trucking industry of free roadways over which they could do business at public expense."

The trucking industry will give you a pretty warm argument on this point inasmuch as they do pay a very substantial amount in the form of motor vehicles taxes which are, as you know, earmarked for highways in 21 States. You have plenty of arguments to show that they [fol. 218] are not paying their fair share of these highways and are contributing, in many cases, nothing, and in other cases, very little, in the way of honest-to-goodness taxes for the general functions of government other than highways.

Page 2—"But with the outbreak of war, as you all know, the trucking industry practically collapsed as a transportation agency."

As a long-haul transportation agency it certainly did very nearly collapse. It was unable to take any part of the tremendously increased freight brought about by the war. However, I hope your staff will appreciate that there must be some difference between long-haul over-the-road trucking and short-haul trucking in local and municipal areas. The short-haul truck increased greatly during the war because here the truck could do a job better than any other form of transport. For example, we found that the convoys were going out light from New York because the floating conditions were such in New York harbor that we could not move the freight across the harbor fast enough. To remedy this, fleets of trucks were employed by all railroads to move large tonnage through the tunnels and avoid the floating problem. The Pennsylvania alone trucked as much as 100 carloads a day from the Jersey side to piers throughout greater New York.

Page 6—" . . . State Rail Taxes Exceed Highway Revenues . . . " I'm wondering if this was not a misquote.

On page 7 you state that only one research book is available. In order to provide all members of the committees with a copy, we have had to increase the number and go into a different form of printing commencing with Volume IV. We have extra copies and can furnish you any number you need. We could also dig up one or two extra copies of Volumes I, II and III if they will expedite matters with you.

Yours truly,

R. J. LITTLEFIELD

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[fol. 219]

EXHIBIT P-28b

THE BALTIMORE AND OHIO RAILROAD COMPANY
LAW DEPARTMENT
BALTIMORE, 1, MD.

E. H. Burgess
Vice-President
and General Counsel

March 1, 1949.

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.,
10 East Fortieth Street,
New York 16, N. Y.

Dear Mr. Girdler:

I have read with the greatest interest and want to thank you for your letter of October 4 enclosing your office memorandum in reference to the public relations work you now have under way for the Eastern Railroad Presidents Conference—Transportation Committee. The memorandum well states the objectives and the means for their attainment.

I have for years had a deep interest in this whole subject, and if future releases bearing upon it are made I shall greatly appreciate receiving a copy.

Very truly yours,

E. H. BURGESS

[fol. 220]

EXHIBIT P-28c

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
Terminal Tower . Cleveland, Ohio

Walter J. Tuohy
President

October 3, 1949

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.
10 East 40th Street
New York City 16

Dear Mr. Girdler:

Indeed I appreciate your thoughtfulness in sending me the copy of a memorandum prepared for the guidance of the department heads of your organization on the work for the Eastern Presidents Conference.

I have read with a great deal of interest your approach to this subject and feel sure that the over-all outcome of the campaign is going to be quite gratifying.

Sincerely yours,

WALTER J. TUOHY

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[fol. 221]

EXHIBIT P-34

EASTERN RAILROADS MAGAZINE REPORT

During the past year the CB&A magazine department has worked with every major monthly and weekly magazine in the general field with such effect that every one, from Harper's magazine to Life and the Saturday Evening Post, has either published or has scheduled publication of a story favorable to our point of view.

The magazine department has worked in three different ways in putting over the railroads' argument on the transportation problem. (1) It has suggested story ideas to magazine editors or free-lance writers, the stories to be

written outside of CB&A. In the case of the railroads, this has been the most frequently used method of placing a story, since the controversial nature of the account and the violence of the opposition makes it dangerous in most cases to become too obviously involved. (2) It has kept constantly in touch with a large number of editors and writers in order to be apprised at all times of any scheduled stories bearing on the problem. (3) It has written its own stories for placement in magazines. This last procedure has been followed much loss frequently in the case of the railroads than with other accounts, for the reasons mentioned above.

Due to the exceptionally long deadline requirements of magazines, a good portion of the stories mentioned in this report have not yet seen print. However, almost every story mentioned here has actually been published or is definitely scheduled.

LIFE: This magazine has definitely scheduled at least one, perhaps two, stories on the present road tests being conducted in Maryland. CB&A brought the story to the attention of Life's science editor, who assigned a photographer for three days during the second week in July to take pictures of the early stages of the test. Life will send [fol. 222] another photographer to cover the test in the autumn to show before-and-after pictures of the road's deterioration. The second story is definitely scheduled for autumn. However, Life may run a story in the near future featuring the July pictures. (Note to Ben—we will probably have word on this by the end of this week.) In this case, we are giving extra-cautious handling to the story: after the initial interesting of the magazine in the piece, we are trying to keep out of the picture as much as possible and contenting ourselves with a general follow-up of the story's progress.

Life has had for several months a story in its inventory on the general subject of the trucks and how they are cluttering up the highways. We have worked with them on this, but they had had difficulty, despite a good deal of effort on their part, in getting good pictures to illustrate it with. We are keeping on the lookout for any picture possibility that might revive the story.

READER'S DIGEST: CB&A put considerable effort in researching and providing material for Frederick C. Brownell for his piece, "The Rape of Our Roads," which appeared in the June issue. It might be pointed out that the article was so effective that the ATA recently was forced to resort to a full-page advertisement in Editor and Publisher defending itself against the criticism voiced by Brownell.

The July issue of the magazine contained the article, "All the Railroads Want Is a Fair Deal," by John L. Beckley with whom CB&A originally worked when the article was scheduled for Newsweek magazine.

HARPER'S: CB&A learned that this magazine had assigned a story on the general topic of the deterioration of the roads to Myron Stearns, a free-lance writer. The magazine department immediately contacted Mr. Stearns, learned that he was far behind schedule and in a hurry to make his deadline. We spent two days providing material for him and as a result the piece, "Our Roads Are Going to Pot," [fol. 223] scheduled for September or October, will in all probability strongly favor our point of view. Stearns is a contract writer for the Reader's Digest and, if it does not too closely parallel the Brownell piece, his article may be reprinted.

CB&A submitted a staff-written article, "Revolution on the Roads," to Harper's early in the summer. The story dealt with the rise of the trucking industry and its effects on the nation's driving habits. Harper's liked both the subject matter and the writing, but it felt that the CB&A connection ruled out the piece for that magazine. However, Harper's is now planning to assign such a story to one of its writers, and the CB&A-written article is now under consideration by the

ATLANTIC MONTHLY.

ARGOSY: At a meeting with the editors of this magazine the magazine department suggested a story describing the life of a small, fly-by-night trucker, the story to be based on a New York-Buffalo trip with the driver. Argosy has requested an outline, which they are now considering.

PARADE: This magazine has scheduled a picture story on the Maryland road tests for late fall. CB&A is furnishing both the text and pictures.

SATURDAY EVENING POST: Article by SEP staff writer, David Wittels, scheduled for early fall publication as lead story. CB&A furnished extensive national research in 5000-word background memorandum to round out Wittels story on Maryland state highway commission program.

PAGEANT: Article by free-lance writer, Clive Howard, scheduled for September publication entitled, "The Great American Honk-Honk." CB&A furnished research and statistical background for this definitive article on problems of highway congestion.

EVERYBODY'S DIGEST: Article by free-lance writer, Bertram Vogel, entitled "The Giants That Wreck Our High-[fol. 224] ways" appeared in April 1950 issue. It was based almost completely upon CB&A research and development.

THE AMERICAN MAGAZINE: Article by Senator Joseph C. O'Mahoney entitled "What Bad Roads Are Costing Us" appeared in April 1950 issue. CB&A furnished minor research and comment for this article on national transportation problems and need for congressional action.

COLLIER'S WEEKLY: Article by Collier's staffer, Bill Davidson, now in work based on CB&A research project entitled "Showdown in Illinois" on state highway regulation program.

CORONET: Article conceived by CB&A and written by free-lance writer, Dickson Hartwell, entitled "They Guard Your Pocketbook" scheduled for fall publication. Major portion of article deals with work of Citizens Public Expenditures Survey and results of Griffenhagen survey.

HOLIDAY: Article on Route 1 and the hazards of passenger travel from New York to Miami now in writing.

SATURDAY EVENING POST: Research project by CB&A on letters to the editor now in the hands of SEP associate editor, Wesley Price.

In addition the magazine department handled service queries from numerous other magazines as well as from the account itself. Obtained permission from Reader's Digest author Brownell to reprint, without making royalty payments, his June "Rape of the Roads" article in four railroad brotherhood magazines; obtained reprints of various articles; and by keeping in weekly contact with magazine editors and writers were able to soft-pedal or side-track several incipient stories that would have proved detrimental to the railroads' interest.

July 20, 1950

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[fol. 225]

EXHIBIT P-35

Memo to: Mr. Swinehart

Re: Discussion with Metzman

June 1951

Background of Problem

When the presidents decided to embark on this program, they decided that a change in their tactics was necessary. They decided to abandon completely attacks by the railroad industry on trucking subsidies, and in their stead, carry on the fight by means of other affected groups. This meant, in the final analysis, involving other people and getting them to fight your battles.

Now where could you find such people? Obviously, the only people that you could involve directly, and upon whom you could rely for stout fighting, were people who had some reason to do something for the railroads.

As an example, we were able to mobilize the farm groups partly out of railroad association with certain farm leaders but mainly through the deal we made in support of the farm radio network. Everyone understood the quid pro quo, so the alliance was a strong and reliable one.

But speaking generally, the entire campaign, in every state, has been badly handicapped because the railroads themselves have not been organized properly to exploit their many contacts.

Here are some examples:

We formed the Empire State Transport League in New York because we needed an organization that could legitimately mail all types of propaganda on the general subject of trucks and highways.

You needed some strong man to take the lead in forming the group, even though his name might *never* appear in it. We went first to Charley Symington, of Symington Gould. Everyone in the railroad business told us Charley [fol. 226] would do anything to help the railroads. Charley ducked the job neatly. The proper people didn't put the arm on him. Others either ducked out entirely or promised to do things they never did. We wound up with a few fellows, some of whom allowed their names to be used, but that was all.

The secretary was a former assemblyman, college pal of Kiely's, and a dealer in gravel which he sold to the Central. He was the main worker. While doing work for us, he discovered that his gravel competitor, who always shipped by truck whenever he could, had just landed a big New York Central contract.

One motor club we tried to get was largely owned by a director of the Erie. We tried to get Johnston, president of the Erie, to speak to his director and get that motor club to join the fight. We never heard another word.

In Ohio, we were rounding up local truckers. The man from the Baltimore & Ohio who was on the Ohio committee was trying to line up his truckers through his trucking man when the operating vice president of the B & O countermanded the order and we lost two witnesses and spokesmen. I could recite incidents like this not by the sixes and sevens but by the hundreds.

On the other hand, two agricultural agents of the New York Central were all we needed in Ohio to get all four major farm groups out there and a lot of other strong citizen groups too. Just imagine what could be accomplished if somehow the resources and contacts of the railroads could be properly mobilized!

The truckers can do it—why not the railroads?

To sum up: the big lack in this effort, and a lack that Dugan foresaw in the beginning, is a man or the mechanics

by which ALL the contacts and resources of EACH railroad can be utilized. The more railroad people whose contacts can be utilized, the more people you involve on your side. The more people on your side, the greater the publicity and the greater the public pressure.

[fol. 227] Now, what's to be done?

Frankly, I don't know. Somehow the word must be gotten to on-the-line people that the presidents are spending real money on this campaign and they mean business.

Perhaps we should hold meetings with each department head of each railroad as we start into a new state. As you know, we have had meetings with state association people, but too many times some of these members come to the meetings in a purely perfunctory manner and later, when you call upon them for some help, do little or nothing because there is no president's name on the order blank.

Dugan originally foresaw the need for one man to coordinate this effort, and described the duties of such a man in the memorandum that started this whole thing. That need for strong coordination, for effective liaison between individual railroads and individual railroad men, is what prompted him to suggest to Metzman that I be hired by the Conference full time for that coordinating job.

You have a delicate problem here because implicit in all this discussion is criticism of the PR Committee. No such criticism is intended, nor can it be fairly leveled against the PR men. Each state job is really the responsibility of the individual state committee, some of whose members know the story and take it seriously, some of whom do not. But even committee members who work hard at their assignments can be stymied now, as witness the case of the B & O man. Chase of the Pennsylvania, chairman of the committee, was in no position to override or even question an operating vice president of the B & O. That operating vice president was not to blame; he didn't even know of the Ohio effort and probably thought his man was off on some boondoggling expedition instead of attending to the business for which he was paid.

So I think you could properly raise the question with Metzman as to the possibility, in the future, of having

department heads summoned to a meeting by a presidential edict. The president may or may not attend such a meeting. [fol. 228] That wouldn't matter so much as merely the knowledge that he was interested in the effort. It all gets down to that; *there must be more evidence of presidential interest.*

We can take it from there.

Such operating difficulties have been held to a minimum in New Jersey largely because of the interest and strength of Bill White of the Lackawanna and Herman Pevler, an operating vice president of the Penn. But Pevler is gone now to Chicago, and we will lose an effective personality. I don't know how much interest the new man will take in this situation.

This discussion could do much to acquaint Metzman with the problem and the ways of ameliorating it. It also should raise the other questions on which you can be firm, and don't forget a plug for Blosser.

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[fol. 229]

EXHIBIT P-109

MEMORANDUM

To: Don Stull Date: June 29, 1951

FROM: C. Colburn Hardy

Enclosed is material which will outline Senate Bill 615 which we are vigorously opposing. This measure, in some form, has come up for the past six years and has been defeated largely by the opposition by the Governors—Ed Martin and Jim Duff. This has made the auto clubs and public rather unorganized but we have been able to change that considerably.

The enclosed editorials will give you an idea of what we're striving for—(1) to defeat the bill outright or (2) to delay action until the Maryland road tests are complete. You will have to use whatever theme seems to fit the editor.

Our general technique has been to contact the local auto club and get them to issue a statement or a letter to the senator and representatives. Then you pick this up by the

local press. We're interested particularly in the Armstrong and Butler counties. The big cities are Butler and Kittanning. The senator is Albert R. Peachon, 903 Fifth Avenue, Ford City. The dailies are the Butler Eagle and the Kittanning Leader-Times. If you want to hit New Castle and Grove City, that's okay, but we're in good shape in those counties.

I think it will be okay to be working with the Pennsylvania State Grange. The secretary is Joab K. Mahood (pronounced Mu-hood). They are leading the fight, working with the Motor Federation of Pennsylvania (AAA), Pittsburgh Motor Club, Federation of Women's Clubs, Association of Township Supervisors, CIO and UMW. I think the pressure of the labor groups will be helpful in this area.

[fol. 230] You can explain that you've been working with the Ohio Grange and that the National Grange has pulled everybody into this fight.

This is a little ticklish, I know, but I'm sure that you can handle it. We're trying to keep the railroads out of this but if you need help, you can contact J. A. Kennedy, who is the Pennsylvania agent at Kittaning or J. W. Carr, Pennsylvania agent at Butler.

As we haven't been able to get the auto club to move, we've been making a direct approach to the papers and asking for editorials. Then we picked up the editorial and sent it to the senator, etc., but let's do that from Harrisburg. I'll be in New York on Monday and in Harrisburg on Tuesday at the Penn-Harris Hotel. We're making our headquarters at the Pennsylvania State Grange, Telegraph Building, Harrisburg 2-3791.

The Pittsburgh papers are hot against the bill which should be helpful. Jim, Horace, or I can answer all questions.

[fol. 231]

EXHIBIT P-148

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

TO: Jim Miller DATE: Aug. 29,'52

FROM: Gordon Sears SUBJECT: Toll Roads

Jim:

The enclosed opus has passed the board of censors on ERTC and now we are ready to decide which magazine should perpetrate it upon the defenseless public. Coly is convinced it can be slicked into a slick mag, advertisers be damned, since it really doesn't take any roundhouse swipe at the truckers. I'm inclined to agree that it could hit a good general circulation magazine. If you could get a nibble from some such I could (I think) convert it to the appropriate style or get sex into the lead or whatever is needed. But, then, you get paid to worry about these things so I will accept your decision in good grace. Then you can convince Coly.

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[fol. 232]

EXHIBIT P-174

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

TO: John Stahr DATE: June 30, 1952

FROM: Pat Lochridge

Another nomination from the magazine department—that ace ghostwriter, James Miller—from one slight clipping in the Manitowoc, Wis., Times developed a 1500-word story, "History, Trucks and Money", which appeared in the April issue of the National Grange. This article was important to the ERTC cause because it reached the group, the ac-

count was most concerned about, namely the farmer. The article skillfully developed all the major points in the ERTC campaign.

P. C.
...pl...

Please return magazine for our files.

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[fol. 233]

EXHIBIT P-178

May 20, 1952

Dr. Milton S. Eisenhower, President
The Pennsylvania State College
State College, Pa.

Dear Milton:

Am enclosing a copy of "History, Trucks and Money," which appeared in National Grange Monthly of April.

A few of the high spots of this article are:

(a) Highways are going to pot.

(b) One of the major contributing causes is the big over-the-road truck.

(c) It will require $4 billion a year for the next 15 years to maintain our roads at present standards.

(d) There are two answers—(1) Cut down on the damage; and (2) Get more money for upkeep.

(e) The big intercity truck that pays the smallest proportionate share should pay more for use of public property for private profit.

Yesterday, the Firestone Tire & Rubber Co. carried a full-page ad in the New York Times, emphasizing the importance of good roads. In this ad the statement is made that from $5 to $7 billion a year for the next 15 years will be needed. The ad gives us no light as to where additional money is to come from.

We don't disagree with the importance of good roads, and the necessity for much more vision in planning highways, especially in or around congested areas.

The ad states that "more than 40,000 communities are completely dependent upon cars, trucks and buses for all

of their transportation needs." This is not a correct statement. It was worked out by some clever mathematicians who are in the trucking industry. If a railroad station has [fol. 234] not the same name as the community, it is classified to a point without rail transportation. Another ridiculous method is, for example—Community "A" may not have railroad tracks, but Community "B", which adjoins, and is sometimes only a mile or two away, may have the best railroad service in the world, yet Community "A" is classified as being served only by highway transportation. We hope to clear up this misunderstanding.

Another development which has made history is the Maryland Road Test. For the first time in the history of the world a stretch of highway was set aside and used only for testing purposes. Trucks of different weights ran back and forth over this test road for six months. After thousands of tests and records were checked, the Highway Research Board found that an axle load of 22,400 lbs. did six times the damage of an axle load of 18,000 lbs., and a tandem axle of 44,800 lbs. did twelve times the damage of a tandem of 32,000 lbs.

In spite of these findings, the trucking industry is turning heaven and earth to get heavier weights on public highways. Furthermore, the trucking industry is so upset over the findings of the Maryland Road Test that it is using all sorts of tactics to discredit the conclusion. There is attached some of the recent material on the Maryland Road Test.

Trucks are here to stay, but a tremendous amount of research and public education will be necessary before this country has the right answer to the economics involved in the use of public property for private profit.

In many state legislatures, the most controversial issue year after year surrounds the big truck—size, weight and payment for use of public highways.

Sincerely yours,

/s/ "Patch"

[Enclosed was a copy of Plaintiffs' Exhibit 173 reproduced at pages 573b and 574b of Appellants' Appendix in No. 12751.]

[fol. 235]

EXHIBIT P-187

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

To: Pat Lochridge

FROM: Don Stull SUBJECT:

Coly Hardy asked me recently to give you some sort of "package" on Lasuche's stand on the weight-distance tax. I tried gathering up scattered quotes, but this didn't offer what I thought was a good "package." However, I recently had the opportunity to help one of Lausche's publicists prepare an answer to a critical letter the governor had received from the head of a trucking firm. The enclosed copy of the letter (containing mostly our poison) pretty well lays down Lausche's policy on the matter.

I'm enclosing also a news clipping which shows how vigorously he supports the tax.

As of this writing, the Lausche letter never has been released to the press—although I'm doing all I can to see that it is. If, however, you want to quote him on any part of it, I'm sure we can arrange that. For the letter really contains nothing new—he's said it all before in some form in the public prints.

Regards,

[fol. 236]

EXHIBIT P-207

ERIE RAILROAD COMPANY
ERIE

George C. Frank
Assistant to President

Midland Building
Cleveland 15, Ohio

October 10, 1950

Mr. T. J. Deegan, Jr., Vice President
The Chesapeake & Ohio Railway Company
Chrysler Building
New York 17, N. Y.

Dear Mr. Deegan:

Your joint letter of September 26 was very helpful in reviewing the previous discussions on the problem being considered by our committee. There is no question that serious thought should be given to an appraisal of our present activities and our future course of action in view of the Korean war. I can well appreciate, too, the need for having definite objectives from a public relations standpoint.

However, I think we should also keep in mind that, as a subcommittee of the Eastern Railroad Presidents Conference, we are to deal with such competitive transportation matters that can be handled on a state level, particularly on the subject of proper allocation of highway user charges.

In reading the so-called "Manifesto" once more, its purpose seems to be to urge immediate action on the establishment of a national transportation policy. There is nothing now in this statement that hasn't been said many times before and is already a matter of public record. Frankly, I don't see the need for issuing such a statement [fol. 237] by the ERPC, nor can I see that it would accomplish any purpose. In fact, I think it would be a mistake for them to do so. The railroad position has already been expressed through the AAR in the S-50 hearings, in its

advertising and in public statements. The issuance of a "Manifesto" as proposed would not give us anything we do not already have.

If it is the intention to give more emphasis at this time to the establishment of a sound transportation policy, the matter is one that should be handled under the direction of the AAR in the light of their preparation and presentation of the testimony in S-50. Anything we would attempt to do in this connection might be in conflict with the activities of the AAR. I do not think it would be good judgment for a regional group to try to carry the ball on a national policy of this kind, and in my opinion, it is beyond the jurisdiction of our committee.

As a matter of fact, I was surprised to learn from the letter you wrote to Tommy Ross, that the seven points you outlined "have been the objectives of the Competitive Committee since it was organized." It seems to me that we are all losing sight of the job we were designated to do and that there is a need to clear the atmosphere.

While the seven points listed are a necessary part of telling the overall railroad story, are we actually attempting to make them our objectives, or are we to try to correct transportation inequities in the 17 states represented by the Eastern Railroad Presidents Conference?

While I was not present at the White Sulphur meeting, from the correspondence and discussion since that time, it seems that the specific question we have been asked to resolve is a theoretical one, namely, "how can the railroads justify their efforts to make long haul trucking more expensive when, with the present car shortage, they are not in position to handle any greater volume of business." If this is the basic question, the "Manifesto" does not help to clear up the point. Perhaps some statement can be drafted [fol. 238] to anticipate this question, but I don't think the "Manifesto" does it.

Yours very truly,

CC: Messrs. C. R. Dugan
J. M. Fitzgerald
J. G. Lyne
T. J. Ross
R. N. Van Sant

[fol. 239]

EXHIBIT P-261

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
Chrysler Building, New York 17, New York

September 13, 1950

Mr. T. J. Ross
Ivy Lee and T. J. Ross
405 Lexington Avenue
New York 17, New York

Dear Tommy:

At our meetings in White Sulphur, one of the discussions centered on what changes, if any, Korea would exert on the public opinion climate in which we would be operating.

It was apparent that the trucking industry would be in a position to advance two major points:

1) Since the railroads were short of cars, and since the car shortage might grow more acute, long-distance, heavy trucks should be encouraged in every way possible.

2) All weight and size limitations on heavy trucks should be waived by the states as in World War II.

As you know, ATA spokesmen have been quick to advance Point One, and are hinting at Point Two.

It seemed to us that our Competitive Committee could, however, anticipate the truckers' views and capitalize on the changed conditions by issueing a statement both in news release and paid advertising form that would

1) Dramatize the record of the railroads in World War II

2) Establish the railroads as the most essential and *most economical* transportation agency.

[fol. 240] 3) Remind the public of the tremendous investment made in new equipment by the railroads since World War II

4) *Prove that even greater expenditures would have been made had the railroads been accorded even a semblance of fair competitive conditions*

5) Give vocal and effective support to the views already presented by railroad spokesmen before the S-50 hearings

6) Identify our Competitive Committee efforts as consistent with the public welfare, and

7) Perhaps accelerate an understanding of the difficulties the railroads face in being forced to continue unprofitable, short-haul and branch line operations.

The memorandum you received Tuesday morning is designed to accomplish the above objectives. Both generally in detail it squares with railroad policy, should help in explaining any deficiencies that might arise in railroad service, gives us another opportunity to put ourselves on record in a positive and constructive manner, and, above all, reiterates the inequities in the current situation.

Sincerely,

(signed)

[fol. 241]

EXHIBIT P-275

PENNSYLVANIA STATE GRANGE
ORGANIZED 1873
103-04 Telegraph Building
HARRISBURG, PENNSYLVANIA

BEATTY H. DIMIT
Master
JOAB K. MAHOOD
Secretary
PHILIP PRICE
Treasurer
ELIZABETH MILLARD
Lecturer

EXECUTIVE COMMITTEE
W. A. ELDER
Mercer
HAROLD ALLEBACH
Collegeville
GEORGE F. RUTH
Robesonia

Thursday

Memo:

To: WILLIAM A. REITER

FROM: C. Colburn Hardy

Enclosed is a copy of a proposed release. I am not sure about it and would like to have your reaction and suggestions.

The background is this: Earl Feldman was most helpful. While he was unable to contact Fred Burgraff at the Highway Research Board, he will call me by 10 am Friday morning. He is not at all sure that we can use the report, even if it is available. He believes that it will be highly technical, will not add any new data to the road damage, and might prove too detailed to be of use in any release to the general public.

[fol. 242] There are some good points in the enclosed release: (1) It will get some space as the papers want copy in the truck fight. This would be only in the Sunday papers. (2) It will keep the battle in the press and might inspire some editorials.

On the other hand, the drawbacks are: (1) The release is somewhat forced and does not add any new information: (2) The proposal for study might be interpreted as weakness on our part; (3) The release interjects a new, and

not-quite-to-the-point theme, the weight distance tax; (4) under Penna. law, all highway user revenues are dedicated to the highway fund, so actually the extra revenue would not help to solve the tax problem unless they went into the general fund or some other form of general revenue. This could be defended but it might antagonize some of our friends from the AAA, etc.

Joe Mahood is away and has not seen the release. I think he will go for it if I insist. And, of course, I can check with Dick Maxwell.

I plan to use Cappy Thomson predicting a gas tax rise for Saturday's papers and can get this weight-distance tax story for Sunday.
BUT I'll take no action without your comments. Of course, if the Maryland Road Test report comes through and can be used, I'll concentrate on that.

COLBURN

Defeat of the Big Truck Bill and enactment of a weight-distance tax would go far to solve two of the Legislature's knottiest problems: truck weights and additional revenue, Joab K. Mahood, secretary of the Pennsylvania State Grange said yesterday. He urged that a commission be appointed immediately to study the proposals and report back later this year.
[fol. 243] "Now that the Legislature is deadlocked on tax proposals," he said, "every source of new revenue should be studied. With the rising expense of maintaining truck-damaged highways, it is clear that there must be a permanent, sound system of road financing and proper protection for our highways and bridges. From the experience of other states, it seems evident that Pennsylvania can raise an additional $15,000,000 to $20,000,000 a year by making big trucks pay their fair share of highway costs."

Mahood pointed out that the proposed commission would have the advantage of factual data: (1) on truck damage to highways from the final report of the Maryland Road Tests to be released in October; (2) on the weight distance tax as recently enacted in New York State.

"As the Grange showed recently," Mahood added, "the passage of the Big Truck Bill would permit a handful of long-haul truckers to increase their earnings by millions

while Pennsylvania would receive no more than an additional $37 per year per vehicle."

He said that Pennsylvania now receives no revenue from out-of-state trucks except a few pennies gas tax and that truck fees here were among the lowest in the nation. For a 30 ton, four axle tractor-semi-trailer, he reported, Pennsylvania would charge a $297 registration fee compared to total fees of $360 in New Jersey, $1400 in New York, $499 in Ohio, and $490 in West Virginia. He stressed that both New Jersey and Ohio are now studying ways to adopt the proposals of the Council of State Governments for the weight-distance tax.

"While we are confident that the Big Truck Bill will be defeated because of the overwhelming public opposition," Mahood continued, "we recognize that this defeat does not solve the critical problem of highway maintenance and upkeep. A factual study by highway engineers and tax experts is sure to provide sufficient data to make an intelligent, sound, long-range solution possible."

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[fol. 244]

EXHIBIT D-28

COPY

SELVAGE & LEE
INDUSTRIAL PUBLIC RELATIONS
1 East 43rd Street, New York 17, N. Y.

August 9, 1950

Mr. Thomas J. Deegan, Jr., Vice President
The Chesapeake and Ohio Railway Company
Chrysler Building
New York 17, New York

Dear Tom:

I been robbed! I been misquoted! I didn't say it!

Seriously, Tom, your quotation of me in your memorandum seems to pose me as suggesting termination of the various programs as becoming untimely. After all of the discussion that followed my introduction of the war theme, Morrie Lee and I found it difficult to reconstruct all of the thinking. Jim Lyne has just about done it.

What I thought I was saying was this:

> The programs to date have been largely negative aimed directly at the trucks and designed to curb their more nefarious activities. Now, with a war situation approaching, with the possibility that there would be a shortage of freight cars (and resultantly a demand for using any kind of a vehicle to move cargo), might it not become unpopular to urge curtailment of any form of transportation. It would be like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it.
>
> Therefore would we not be wise (speaking to your Committee at White Sulphur), while we are down here and in a position to get some solid thinking done, to take stock of possible future developments and plan [fol. 245] to change the editorial theme of the programs if and when it becames necessary. Let's not wait until we suddenly get hit and, perhaps, have some of our top brass suggesting termination of our efforts; let's have an alternative program ready to meet the emergency.

The last thing in the world I wanted to suggest was that we abandon ship. I simply proposed that we project a different and more positive format, if it became necessary. It would be suicidal, as Jim Lyne says, to stop everything because of the emergency. But let's be prepared to lower one flag quickly with another one ready to run up to the masthead.

I think the recent newspaper ad of ARCI embodies this thinking. It struck the affirmative note for the railroads, it recited their recent expenditures to improve their operating capacity and efficiency, but still got over the Fair Play note.

Inasmuch as our ad's theme was taken largely from Jim's memorandum, from which his editorial was in turn written, we have evinced our agreement tangibly. Summarizing—

1. It would be silly for the railroads or their supporting allies to abandon their efforts toward a new national transportation policy.

2. Intensification rather than diminution is desirable if the situation develops where trucks will be even more in demand.

3. It seems more likely than it did at White Sulphur that an alteration of structure and theme will be needed along the lines of the Lyne editorial.

Cordially yours,

/ signed Jim
/ typed James P. Selvage

/jm

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[fol. 246]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,750 and 12,751

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NOERR MOTOR FREIGHT, INC., et al., Appellants in No. 12,750,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al., Appellants in No. 12,751.

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Appeals From the United States District Court for the Eastern District of Pennsylvania

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Argued June 8, 1959

Before Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

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OPINION OF THE COURT—December 10, 1959

Per Curiam.

In this antitrust action for an injunction and treble damages,[1] forty-one long distance trucking companies and

[1] Sherman Act, 15 U.S.C.A. § 1 et seq.; Clayton Act, 15 U.S.C.A. § 15.

[fol. 247] their trade association, Pennsylvania Motor Truck Association, sued twenty-four major eastern railroads, Eastern Railroad Presidents Conference and Carl Byoir Associates, Inc. a New York corporation, the public relations agency for the Conference.

Plaintiffs charged in their complaint (filed April 30, 1953) inter alia, that in or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the antitrust laws of the United States, aimed at destroying the plaintiffs and those similarly situated as competitors in the field of the hauling of freight, and at carving out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the railroads would have a monopoly on freight hauling in interstate commerce; that the defendant Railroads worked for those ends through the defendant Conference; that the latter retained defendant Byoir as publicity agent to carry said conspiracy into effect; that thereafter the Conference, its committees, members thereof, the defendant Railroads, their presidents and trustees and other individual defendants and Byoir, with divers other persons unknown to plaintiffs, have acted in combination and concert to obtain the objectives of the conspiracy. The means used are detailed in the complaint; a continuing conspiracy to the date of the complaint is alleged; damage to each of the plaintiffs is asserted, irreparable, continuing injury stated and an injunction asked. Defendants denied the charges of the complaint. In 1956, after the case had been assigned a trial date, October 1, 1956, and while discovery procedures were pending, some of the Railroads and the Conference sought permission to and were allowed to file a counterclaim against the plaintiffs. This claimed that plaintiffs were engaged in an illegal conspiracy to obtain a monopoly of the long haul freight industry in the same part of the United States as set out in the complaint and to force the Railroads out of that part of the transportation business in that area.

[fol. 248] The case went to trial before Judge Clary on October 1, 1956 and lasted almost four months. There were many witnesses and 968 exhibits. On October 10, 1957, the

court in an exhaustive opinion (it covers 73 pages in 155 F. Supp. 768-841) found in favor of the plaintiffs against all the defendants on plaintiffs' cause of action and against the defendant counterclaimants and in favor of the plaintiffs on the counterclaim.

Soundly based on substantial evidence, the trial court found that the Railroads and Byoir, as contended, had conspired in unreasonable restraint of trade to injure the truckers in their competitive position in the long haul freight industry in the northeastern part of the United States; that their immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers; that instead of meeting the truckers competition in the long haul freight field, the Railroads and Byoir combined to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the Railroads; that they adopted and carried out a full program to obtain that objective; that serious private injury to the truckers was accomplished, definitely a loss of good will to the trucking industry and in some instances that loss of good will being extreme; that their actions destroyed to a large extent the public confidence which the truckers had fairly earned and which might have been increased in the light of the innumerable beneficial accomplishments of the truckers in long haul transportation.

The court found on overwhelming evidence that it was no series of individual conspiracies in the various states involved but one large ever-growing conspiracy as charged having as its goal to injure and/or destroy the long haul trucking industry and that the main means used to attain [fol. 249] such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under

the guise of public spirited organizations and with the defendants' interest concealed.[2]

The record shows the defendants' antitrust conspiracy completely established against all the defendants named in the decree.[3] It shows both legal and illegal methods to

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[2] The third party apparatus employed by the defendants, while concealing their own adroit manipulation thereof, in seeking to procure legislative and executive action is contrary to public policy and illegal. Marshall v. The B. & O. Railroad Co., 16 How. 314, 335 (1853); Angle v. Chicago, St. Paul, etc. R. Co., 151 U.S. 1 (1893); Commissioner of Internal Revenue v. Textile Mills Securities Corp., 117 F.2d 62 (3 Cir. 1940), affirmed 314 U.S. 326 (1941). Cf. United States v. Silliman, 167 F.2d 607 (3 Cir. 1948), cert. den. 335 U.S. 825 (1948).

[3] The attempt to influence legislation and executive action while rightly held by the trial court to be less important than the direct vilification of the long haul trucking industry was nevertheless properly found to be a vital element of the defendants' conspiracy to injure and/or destroy that group. Even assuming the brazen interference with legislation and executive action in this instance was lawful, its entire motivation was shown to emanate from the conspiracy charged. It was part of defendants' scheme to wreck their competitor, to monopolize that branch of commerce for themselves. As such it violated the Sherman Act. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 497-502 (1949); United States v. Krasnov, 143 F.Supp. 184 (E.D.Pa. 1956), affirmed 355 U.S. 5 (1957); Atchison, Topeka & Santa Fe Railway v. Aircoach Transport Association, 253 F.2d 877, 887 (Ct. App. D.C. 1958).

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), urged below and here by the Railroads, has no real application to the facts before us. The later decisions of the Supreme Court in United States v. Sisal Sales Corporation, 274 U.S. 268 (1927) and Steele v. Bulova Watch Co., 344 U.S. 280 (1952) clearly indicate that the Banana Company opinion is limited to the proposition that the Sherman Act cannot be invoked against persuading a foreign sovereign to act. Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co., 214 F.2d 413 (5 Cir. 1954) is the other decision stressed by the Railroads in the district court and on appeal. That too is hardly an authority for anything pertinent under the instant unescapable facts. There the complaint made no allegation that the conspiracy was directed to ruining a competitor in his business. The later case of Crummer v. Du Pont, 223 F.2d 238 (5 Cir. 1955) and 255 F.2d 425 (5 Cir. 1958), cert. den. 358 U.S. 884 (1958), leaves no doubt but that as of now in the Fifth Circuit Court of Appeals, a conspiracy to

[fol. 250] obtain the illegal objective of injuring and/or destroying the long haul trucking industry. It shows injury to the plaintiffs and to the public. It justifies the injunctive relief against continuing illegal activities of the defendants. It justifies the compensatory damages (trebled by statute) allowed plaintiff Pennsylvania Motor Truck Association, together with costs and counsel fees. It justifies the holding of the district court that the other plaintiffs, by reason of the stipulation which is very clear and is part of the record, are only entitled to nominal damages. It justifies the dismissal of the counterclaim, which action is not disputed by the Railroads except in line with their argument that the counterclaim is similar in content to the plaintiffs' claim.

Though we think it plain from what we have said, it might be well to expressly note that the suggestion that the Railroads' entire activity, spearheaded by Byoir, was merely a perfectly legitimate public relations campaign for legislation is fanciful in view of the impressive documentation in the record of the finding of the trial court " • • • *that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the guardian of the public welfare, as they have so earnestly asserted.*" (Emphasis supplied).

Judge Clary's opinion is soundly predicated on the facts and law of this litigation. We are in accord with it. The decree and orders of the district court of July 22, 1958 and July 31, 1958 will be affirmed.

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drive a competitor out of business is a violation of the Sherman Act even though, as in Crummer, its most important element was the obtainment of its objective by secretly moving under the guise and protection of the public interest and through the public authorities.

[fol. 251] BIGGS, *Chief Judge*, dissenting.

The case at bar merits the attention of the reviewing Court. The record demonstrates that no cognizable offense has been proved under Section 1 or Section 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and that therefore relief cannot be granted to the plaintiffs under Sections 4 and 16 of the Clayton Act. 15 U.S.C.A. §§ 15 and 26. Moreover, the reach of the decision of the court below is disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation. If the interpretation of the court below and of this court be correct the reach of the First Amendment which guarantees freedom of petition will be unduly limited and to an extent at least, destroyed. Rights guaranteed to the States and to the people by the Tenth Amendment will be endamaged. Heavy sanctions, criminal as well as civil, can be imposed on persons who seek the enactment of laws by Congress or by the legislatures of the States. I shall endeavor to deal first with what can perhaps be properly described as "conventional" antitrust law in relation to the case at bar and at a later point in this opinion will discuss the application of the constitutional guarantees referred to.

What the record proves is the following. Certain interstate trucking companies[1] were engaged in hot economic competition with twenty-four major eastern railroads[2] in the interstate transportation of long-haul freight. The Railroads and the Truckers as groups were avidly desirous of increasing their own respective interstate freight haulage and profits and decreasing those of the competing group. Both Railroads and Truckers hired public relations agencies to aid them. The ERPC engaged Byoir. PMTA engaged [fol. 252] Allied Public Relations Associates. The methods employed by the public relations agencies of both the Railroads and the Truckers left much to be desired in respect to moral consciousness. Sources of propaganda were con-

[1] Represented by Pennsylvania Motor Truck Association (PMTA).

[2] Represented by Eastern Railroad Presidents Conference (ERPC).

cealed by both sides by the use of the so-called "third-party" technique.

Both Railroads and Truckers and their agencies desired to influence public opinion in order to increase their own good will and to damage that of each other and thereby to procure legislation favorable to themselves and unfavorable to the competing group.[3] There was no difference in substance between the methods employed by Byoir for the Railroads and those employed by Allied Public Relations Associates for the Truckers except that Byoir was more vigorous, more vocal, and more effective. It was a no-holds-barred fight by both sides. The methods employed might well cause justifiable fear to those concerned with the viability of our representative form of government.

### *Conventional Principles of Law Hitherto Deemed Applicable to Section 1 and Section 2 of Sherman Act Suits.*

As has been said, the action is based on Sections 1 and 2 of the Sherman Act.[4] It is necessary to discuss the applicability of both sections and it is more convenient to [fol. 253] proceed first with a discussion of Section 2. The Truckers' case is deficient when viewed in the light of Section 2, the "Monopoly" section, of the Sherman Act. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

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[3] A typical example is supplied by Senate Bill No. 615, Session of 1951 of the General Assembly of Pennsylvania, referred to from time to time in the testimony as the "Big Truck Bill", caused to be introduced by the Truckers, which would have raised the permissible weight limits of heavy trucks from 45,000 to 60,000 pounds. The defendants procured the veto of this bill by Governor Fine. A somewhat similar bill, also proposed by the Truckers, was "Bill A-13" in the New Jersey Legislature. Similar legislation was also before the legislatures of New York and Ohio. I shall not detail the various bills in the various State legislatures involved. These are set out in full, with many allied matters, in the opinions of the court below. See 155 F. Supp. 768, and opinion on damages, 166 F. Supp. 166.

[4] It should be noted that neither the opinion of the court below, 155 F. Supp. 768, nor that of this court, pinpoints whether the action is sustained under Section 1 or Section 2 of the Sherman Act.

other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . " The offense of monopolizing means ". . . . to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power."[5] American Tobacco Co. v. U.S., 328 U.S. 781, 809 (1946). Since the Railroads have not effected a monopoly on long-haul freight traffic or destroyed the Truckers' business[6] only an attempt to monopolize or of a conspiracy to attempt to monopolize can be proved against them.[7] A necessary element of an attempt to monopolize is a specific

[5] The complaint alleges a conspiracy to create a monopoly. See paragraphs 12, 13 and 14 of the complaint. I assume therefore that the action at bar was one brought under Section 2 of the Sherman Act but I make no point of any deficiency in pleading as will appear from this opinion in the discussion of the applicability of Section 1 of the Sherman Act, the "restraint of trade" section.

[6] Proof in the record aside, the court below and this court are entitled to take judicial notice that the Railroads have not driven the Truckers out of business.

[7] The circumstances are peculiarly unfitted for the maintenance of a Section 2 case. We do not have before us a situation where one corporation, or even a few corporations, attempt to eliminate all competition so that it, or they will be left with unbridled power over prices, output, and entry into the competitive field. An entire section of what may be called the "transportation" industry" consisting of many railroads is accused of trying to eliminate another section of the transportation industry, the Truckers, a situation that as far as research indicates has never previously resulted in successful antitrust litigation. Even if the Railroads had actually eliminated the Truckers' competition completely the Railroads' position would be far different than that of the successful monopolist since there still would be competition among the various railroads. Furthermore the interstate ground transportation industry is a regulated industry, with almost every phase of its activity controlled by the Interstate Commerce Commission.

[fol. 254] intent to effect that result. United States v. Columbia Steel Co., 334 U.S. 495, 531-534 (1948).

This leads to the issue which is dispositive of the Section 2 phase of the instant case. Can an attempt to monopolize the transportation of long haul freight in the sense required by Section 2 be inferred from the evidence? The elements necessary to establish an attempt to monopolize in violation of Section 2 were set out in classic form in Swift and Company v. United States, 196 U.S. 375, 396 (1905), and have remained unchanged. In the opinion last cited the Supreme Court said: "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." Thus it is clear that in addition to an intent to monopolize, the evidence must prove that the activities of defendants in a Section 2 case create a dangerous probability of monopoly. See again United States v. Columbia Steel Co., *supra*.

The court below found as a fact that vigorous efforts were made by the Railroads and Byoir to injure the Truckers' good will business-wise, to decrease the number of the Truckers' customers, to pass anti-trucking legislation and to increase trucking costs and to prevent the enactment of legislation which would decrease those costs. The proof is not sufficient in the instant case to sustain a Section 2 charge. There is no evidence in this record proving that the efforts of the Truckers or Byoir were liable to bring the [fol. 255] long-haul trucking industry to an end. There is no showing that even the most optimistic of the Railroads or Byoir intended, expected, or even hoped, to destroy interstate trucking. The circumstances at bar do not traverse the limitations imposed by the Columbia Steel Co.

decision. Moreover, there is no proof whatsoever of a "dangerous probability" that a monopoly could result as required by the Swift decision. Under the circumstances a cause of action based on Section 2 falls. If the judgment of the court below against the Railroads is to be sustained it must be under Section 1 of the Sherman Act.

But the Truckers have not proved a cause of action cognizable under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits "Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States. . . . " As was said in Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those combinations which 'unreasonably' restrain competition". Mr. Justice Black went on to say that certain agreements or practices have such a pernicious effect on competition that they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". Mr. Justice Black then designates the kind of practices which the courts have deemed to be unlawful in and of themselves and cites the relevant cases.[8] The acts of the Railroads and Byoir were not proved to be such as to cause the case at bar to fall within the category of cases where the principle of unreasonableness is automatically applicable. The court below so found.[9] The issue then becomes: Did the [fol. 256] combination or conspiracy here "unreasonably restrain competition"? The record fails to demonstrate that the Railroads and Byoir did so here.

Moreover, and quite aside from the foregoing, restraints which constitute violations of Section 1 are those which involve conspiracies of members of an industry to follow a mutually self-restricting course in the area of their own

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[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940), price-fixing; United States v. Addyston Pipe & Steel Co., 85 F. 271 (1898), aff'd 175 U.S. 211 (1899), division of markets; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), group boycotts; International Salt Co. v. United States, 332 U.S. 392 (1947), tying arrangements.

[9] See 155 F. Supp. at p. 816.

competence in order to obtain unlawful commercial advantages over customers or suppliers. The plan here, as proved, was to decrease the business of fellow members of the interstate transportation industry, the Truckers. Furthermore the essence of the campaign was not joint action for any one of the Railroads acting alone could have achieved the result which was attained. Any Railroad could have hired Byoir. If the law is to be changed in these important respects the revision should be effected expressly by the Supreme Court and not by this tribunal.[10]

But without regard to what I have termed "conventional" antitrust law and whether the suit is sought to be maintained under Section 1 or Section 2, or both sections, I am of the view that the provisions of the Sherman Act are not applicable here because of what is set out in the following three headings of this opinion.

*Principles of Antitrust Law Applicable Under the Circumstances at Bar Where Legislative Action Was Invoked or Avoided.*

The objectives of the Railroads, as found by the court below, are set out and discussed hereinafter under the heading "As to Damages". It is desirable to state again at this [fol. 257] point that the principal objective of both Railroads and Truckers was to achieve legislation which would increase their own profits from interstate freight haulage and decrease those of the competing group. The actions of the Railroads and Byoir in this respect were described by the court below as the "fomenting of governmental restriction . . . increasing the cost of operation and/or preventing the carrying of greater loads" by the Truckers, and

[10] See *e.g.* United States v. Patten, 226 U.S. 525 (1913), market cornering; Addyston Pipe & Steel Co. v. United States, note 8, *supra;* Fashion Originators' Guild v. Federal Trade Commission, note 8, *supra;* United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), market division; United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), price-fixing, output restrictions; United States v. Paramount Pictures, 334 U.S. 131 (1948), price-fixing and United States v. Frankfort Distilleries, 324 U.S. 293 (1945), resale price maintenance.

was held to be an unreasonable restriction of competition.[11] The public interest must be deemed, of course, to be involved here as it is in every antitrust suit but there is also a potent public interest in the right of the individual to act in support of or in opposition to legislation. Does the public interest in this latter right rise superior to the public interest sought to be preserved by the antitrust laws? Does the Sherman Act apply to legislative restraints or to private activity in support of such restraints? I think the decisions demonstrate that the Sherman Act cannot be employed to make such private activities illegal and that whether successful or unsuccessful they do not constitute unreasonable restraints on interstate commerce.

In Olsen v. Smith, 195 U.S. 332, 344-345 (1904), where the restraint was imposed by a Texas statute, it was held that the intent of Congress in enacting the Sherman Act was to prevent private, not governmental, actions in restraint of competition.[12] In American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909), the Supreme Court dealt with a very similar issue, Costa Rica, by what was in effect law, having confiscated property of one corporation at the instigation of a trade rival. Mr. Justice Holmes said that "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort . . . is that it is a contradiction in terms to say that within its juris- [fol. 258] diction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

In Parker v. Brown, 317 U.S. 341, 351 (1943), California had passed a proration statute which restricted competition among raisin growers and fixed prices. Mr. Chief Justice Stone stated: "The Sherman Act makes no mention of the state, as such, and gives no hint that it was intended to restrain state action or official action directed by a state."

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[11] See 155 F. Supp. at p. 833.

[12] Cf. Mackay Radio & Telegraph Co. v. F.C.C., 97 F.2d 641, 643 (D.C. Cir. 1938).

There is no doubt that a State of the United States in the exercise of its police power may legislate for the health, safety or welfare of its people or that a State may enact legislation affecting interstate commerce if the law passed does not "impede substantially the free flow of commerce from State to State." Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). An exercise of State police power by the enactment of legislation by the State for a proper objective is constitutionally permissible. In Stephenson v. Binford, 287 U.S. 251, 276 (1932), the Supreme Court stated: "We need not consider whether the [State] act [regulating carriage by truck] in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid." Cf. Sproles v. Binford, 286 U.S. 374 (1932). One of the admitted purposes of the legislation with which we are here concerned was the preservation of State highways and another was the raising of State revenues. It appears clearly that the States involved in the instant case acted within their constitutional power, just as Governor Fine acted within his constitutional power when as Chief Executive of Pennsyl- [fol. 259] vania he vetoed Senate Bill No. 615.[13] To hold otherwise would be to nullify substantially State legislative power.

It is asserted that United States v. Sisal Sales Corp., 274 U.S. 268 (1927), and Steele v. Bulova Watch Co., 344 U.S. 280 (1952), in effect overruled the American Banana Co. decision. In the Steele case the action was one brought under the Lanham Trade-Mark Act of 1946, 15 U.S.C.A. § 1051 *et seq.*, and was not based on the antitrust laws but more importantly an act of a sovereign was not involved. In the Sisal case it was held that the Sherman Act did not apply to what the defendants did in Mexico and Yucatan:

[13] Cf. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), wherein the Supreme Court, granting a temporary injunction, held that the purpose of the State act procured by private activity, allegedly to conserve hulls and heads of unprocessed shrimp, was a feigned purpose and therefore was not a valid exercise of State police power.

*i.e.*, procure discriminatory legislation there. Mr. Justice McReynolds stated, 274 U.S. at p. 276, "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our Courts and may be punished for offenses against our laws." The American Banana Co. decision expressly was not overruled. I can find no Supreme Court decision, unless it be Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), note 13, *supra*, which indicates a holding contrary to that of the American Banana Co. decision. The Foster Fountain Packing Co. case seems distinguishable on the ground appearing in the note cited. But in any event in United States v. Rock Royal Co-Op., 307 U.S. 533, 560 (1939), the defendants attempted to prevent enforcement of a minimum Price Order[14] made by the Secretary of Agriculture on the ground that their competitors had engaged in a conspiracy to monopolize in violation of the Sherman Act by securing the drafting, adoption, and acceptance of the order. Mr. Justice Reed stated: "If ulterior motives of corporate aggrandizement [fol. 260] stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

The facts in Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., 214 F.2d 413, 418 (5 Cir. 1954), present an interesting analogy to those at bar and are very similar, save only that legislative action was not involved. It was alleged, however, that the State Road Department of Florida acting as a result of a conspiracy in violation of the Sherman Act between Florida Power and Light Company and others, prevented the Okefenokee Rural Electric Membership Corporation from making use of the only feasible route for an electric line along a public highway. It was alleged in the complaint that the defendants had been guilty of a "smear campaign", had made false arguments and had conducted dishonest activities as a result of which

[14] Order No. 27, under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.

the State Road Department refused to grant the permit for the power line. Treating the facts alleged in the complaint as true, the Court of Appeals, in dismissing the suit, stated: "As so forcibly illustrated in Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 163, 'Injury implies violation of a legal right.' The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, notwithstanding it may have been irreparably damaged." Implicit in this ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency however inspired by the acts of individuals.

I conclude (1) that the Sherman Act was not intended by Congress to be applicable to governmental restraints by way of legislation whether or not induced by private activity [fol. 261] and (2) that private activities such as those conducted by the Railroads and Byoir under the circumstances presented here cannot be deemed to constitute unreasonable restraints or monopoly under the Act.[15]

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[15] Parenthetically, the court below reached, to me at least, the unusual result that the counterclaims asserted by the Railroads against the Truckers could not be maintained though the counterclaims allege acts of substantially the same character and nature as those of the Railroads and Byoir upon which judgment here is based. It is true that the Railroads conceded that the counterclaims are without merit. This concession was, I think, a necessary one. My view is based on the conclusion expressed in this opinion that the Truckers have not proved a cause of action under the Sherman Act. But the court below held that the Truckers' attempts at favorable legislation were permissible because they were attempting to procure laws that would better their competitive positions in relation to the Railroads. The court explains that the legislation sought would have permitted the Truckers to enter fields previously closed to them and that therefore no violation of the antitrust laws was involved. But business gained by interstate truckers of necessity would be at the expense of interstate railroads. Moreover the position of the court below in respect to the counterclaims not stating a valid and proved cause of action overlooks the "good will theory" advanced by the court

*The Constitutional Issue.*

If the reasoning of this opinion as expressed thus far be erroneous, it is necessary to discuss the constitutional questions which are posed by the circumstances and the decision at bar. As I read the opinion of the court below the constitutional protection asserted by the defendants was rejected on the ground that by resorting to a campaign of defamation the Railroads and Byoir invalidated the guarantees of the First Amendment.[16] The majority opinion seems to take a similar view. But I had not hitherto imagined that a constitutional guarantee could be avoided because of the bad conduct of the individual asserting the constitutional right. I do not believe so now. It might be argued, of course, that a determination that a restraint is unreasonable obviates constitutional guarantees but to state this argument demonstrates its invalidity. Cf. United States v. Columbia Steel [fol. 262] Co., *supra*, 334 U.S. at p. 522. The vast importance of the right to petition, usually exercised by joint action, was set out by Mr. Justice Brandeis in his dissenting opinion in Gilbert v. Minnesota, 254 U.S. 325, 337-338 (1920), as follows: "The right [to petition] . . . necessarily includes the right . . . to endeavor to make [one's] . . . own opinion concerning laws existing or contemplated prevail. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." Mr. Justice Brandeis' view in the Gilbert case became the law in Dennis v. United States, 341 U.S. 494 (1951). The First Amendment protects "secular"

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itself as the basis for its judgment. That there were attacks made by the Truckers on the good will of the Railroads is indubitable and the court below so found. See 155 F. Supp. at p. 803. The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison.

[16] See 155 F. Supp. at pp. 826-829.

causes as well as "religious or political ones". Thomas v. Collins, 323 U.S. 516, 530-531 (1945). A proposal to tax trucks stands upon the same ground as a religious speech or an unpopular political idea. The expression of "bloc sentiment" is an integral part of our legislative process. United States v. C.I.O., 335 U.S. 106, 143-144 (1948). There can be no question that the "idea" that trucks should or should not be taxed by the States has "social importance". Roth v. United States, 354 U.S. 476, 484 (1957).

If persons are to be prohibited access to legislators because their utterances may be offensive to personal taste or morals we have moved far away from the Framers' conception of our republican form of government. The concept of lack of access by the people to a legislature is in its essence totalitarian. If material contrary to good morals, such as obscene matter, is placed by an individual or a group in unenlightened self interest before a State legislature it is, of course, permissible for the State to punish the projectors of such material by criminal or civil sanctions. But the imposition of such sanctions assuredly is not the function of [fol. 263] the antitrust laws of the United States. To say that an individual legislator may be over-persuaded or wrongly convinced as to how he should vote is to state a commonplace but to deprive an individual of the right to petition under the guise of protecting private companies from restraint of trade or monopolistic practices is to say far too much and to say it badly. To whom may a person go to attempt to create or change the laws under which he lives if not to his Senators or Representatives, State or National? True, ills may inhere in this democratic process. The legislature may be propagandized by material from a tainted source but this is an abuse which is curable as Congress has cured it.[17] If persons are to be deprived of the

[17] It should be observed that the court below effected legislation for it requires the Railroads and Byoir not to publicize material relating to the Truckers "without disclosing their [own] participation". See paragraph "IV-(6)" of the final decree. I would conclude that this alone would require modification of the form of the injunction entered by the court below and approved by this Court. Cf. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), in which the Supreme Court interdicted the prohibition of "privacy in group association".

right to petition because that right has been subject to abuse, liberty visibly will take flight.

I think that every thoughtful person will agree that the legislative processes cannot be conducted successfully and should not be conducted at all unless members of the public and all interested groups are allowed free access to legislators and legislatures in respect to legislation, pending or proposed. The application of the Sherman Act to limit the free expression of ideas by the public and interested groups, the right to petition, in order to give information, whether pertinent or impertinent, to their legislators and legislatures, would foil the legislative processes which consist in a large part of the balancing of conflicting interests and influences. In this field limitation is the equivalent of prohibition for if persons exercising their right to petition are to be subject to prosecution under the Sherman Act or to damages in civil suits under the Clayton Act, or go in fear of such prosecution or such suits, these persons will not [fol. 264] exercise the right to petition and a fundamental constitutional right will be limited or destroyed. Sources of information now open to legislators as to pertinent conflicting interests will be choked-off or obliterated. The scope of the Sherman Act has been greatly enlarged in recent years and it is indeed a flexible statute but I cannot conceive that Congress intended it to be applied to limit or prohibit free access to legislatures or to the inducing of legislative action by private activity.

Moreover, in the instant case the exercise of State police or taxing power is a most delicate area in the fine balance which must be preserved between the States and the National Government. The enactment of legislation in the two fields designated is peculiarly a concern of the States and the enactment of such laws by the legislatures is the last sanctuary of States' rights. Here another provision of the Constitution comes into play. The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." True, State police power has been curbed in the past by Congress by way of the Civil Rights Acts and State taxation has been limited by Congress where it has been

deemed to trench on interstate commerce. And see again the quotation[9] from Mr. Chief Justice Stone's opinion in Parker v. Brown, *supra*, 317 U.S. at p. 351, where California had passed a proration statute which restricted competition among growers of raisins and also fixed prices. The principle enunciated is central to the Tenth Amendment for one must always ask oneself, as indicated above, how a State legislature could legislate effectively without information or petitions from those affected by legislation? The argument made by the Truckers in substance is that State action is not being affected but only nefarious conduct by those who induced State action is being curbed. It would seem that action by the State under the circumstances at bar must surely cauterize action by individuals. But if the great liberties [fol. 265] guaranteed by the Constitution must be exercised reasonably, surely the circumstances presented here do not warrant limitation of the right to petition by the Sherman Act. I believe that Congress did not intend or even contemplate such a result.

### *As to Damages.*

The court below, as I grasp the contents of its opinion, has concluded that because the Railroads and Byoir embarked on a "Campaign of Vilification" against the Truckers legal damage resulted to them in the form of loss of "good will".[18] The court divided "good will" into two categories: first, good will of the Truckers in respect to their customers, injury by way of loss of business, and, second, loss of the good will of the public, the injury being defined in terms of disability "to avoid the imposition of crippling burdens and restrictions".[19] By stipulation it was agreed by the

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[18] The court below stated: ". . . [A] real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." 155 F. Supp. at p. 810 ("Summary").

[19] The court stated: "[T]he use of the term 'good will' . . . relates not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportion (loss of business), but refers also to the more subtle type of injury done the entire

parties that the only damages claimed by the Truckers were those resulting from gubernatorial veto of certain legislation.[20] Single damages, subsequently trebled were [fol. 266] awarded to PMTA. These were assessed on the basis principally of the money, $217,358, spent by PMTA, through Allied Public Relations Associates, for "defensive measures", measures employed by PMTA to aid the Truckers, including the prosecution of the suit at bar. The monies which PMTA spent were expended for the very purposes for which they were contributed by the Truckers to PMTA.[21]

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trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." 155 F. Supp. at p. 810-811 ("Summary").

[20] Section 3 of the Stipulation is as follows: "The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."

The court took the position that the section of the stipulation quoted limited the money value of the Truckers' claims but not the nature of their claims. This was an erroneous interpretation of the stipulation. The Truckers called to testify conceded that their respective businesses had been harmed only by the legislative action or inaction that the Railroads and Byoir had effected. At pre-trial conference it was stipulated that the Truckers who had not testified as to this issue would give similar evidence. Following this agreement the stipulation set out in Section 3, *supra*, was entered into. The distinction made by the court between the nature of the damage and the scope of the damage money-wise is invalid and also does violence to the intent of the parties.

[21] See opinion on damages. 166 F. Supp. at pp. 166-168. As has been indicated PMTA is a Truckers' service organization. There is nothing in the record which would support its right to maintain a class suit, real or "spurious", on behalf of the Truckers. No satisfactory theory appears under which PMTA can be held to be entitled to maintain a suit in a representative capacity. See Rule 23, Fed. R. Civ. Proc., 28 U.S.C. Cf. United States v. Association of American Railroads, 4 F.R.D. 516 (N.D. Neb. 1945).

It appears therefore that these expenditures made by PMTA were in reality paid for by the Truckers and that PMTA was a mere agent or conduit for the sums expended. I therefore can perceive no basis for the reimbursement of these sums to PMTA by way of allowance of damages to PMTA.

Moreover, the court below, while expressly refusing to allow damages to the Truckers because of the successful efforts of the Railroads and Byoir in defeating legislation sought by the Truckers, nonetheless allowed each of the Truckers nominal damages of six cents, trebled, eighteen cents, because of the Railroads' and Byoir's bad conduct. Since the court below held that no legally cognizable damages could ensue from acts entirely governmental[22] no legal foundation to support these nominal awards appears.

A substantial counsel fee was also allowed to counsel for the PMTA. This award also must fall if the judgment is reversed as I believe it must be.

I am also of the opinion that the injunctive relief granted under Section 16 of the Clayton Act is without justification. [fol. 267] My conclusion in this regard is not based on any alleged abuse of legal discretion by the court below. It rests on the broad ground that no facts were proved which, under the antitrust laws, could justify the injunctive relief granted.

In conclusion, on the issue of damages, it is desirable, although perhaps not necessary, to comment briefly on the approach of the court below to loss of "good will" as elements of damage. If damages are to be recovered under Section 1 (or for that matter, under Section 2) of the Sherman Act in conjunction with Section 4 of the Clayton Act, there must be proof of damage. As to the loss of good will by the Truckers, business-wise in respect to their customers as defined by the court below, quoted in note 19 *supra*, it is clear there was no showing of any loss of business by any individual Trucker. None of the Truckers had or could have a legally protected interest in the good will of the trucking industry as a whole. Cognizable injury under the Sherman Act must be to some "business or property", *i.e.*, a violation

[22] See 155 F. Supp. at pp. 834-835.

of some property right or business which is recognized by the law.[23] The court below took the position that the trucking industry is a legal entity possessing a cognizable interest in a kind of general good will belonging jointly to all Truckers in the suing group. But the suit at bar is a private antitrust suit. No joint right whatsoever is involved and each Trucker must maintain and vindicate his own separate and individual right.[24] There can be no good will in gross. There is no evidence that any of the Truckers individually suffered or was threatened with any injury to his good name or to his business reputation. This element of damage at-[fol. 268] tempted to be proved by the Truckers was shown to be completely lacking in factual foundation.

For the reasons stated I must dissent. I would reverse the judgment of the court below save only as to that portion of it which denies relief under the counterclaims.

[23] See Harrison v. Paramount Pictures, 115 F. Supp. 312, 316, 317 (E.D. Pa. 1953), aff'd *per curiam* on the opinion below, 211 F.2d 405, (3 Cir. 1954); Melrose Realty Co. v. Loew's Inc., 234 F.2d 518 (3 Cir. 1956), cert. denied, 352 U.S. 890 (1956).

[24] See Hess v. Anderson Clayton & Co., 20 F.R.D. 466 (S.D. Cal. 1957); Weeks v. Bareco Oil Co., 125 F.2d 84 (7 Cir. 1941); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7 Cir. 1952); Bascom Launder Corp. v. Telecoin Corp., 9 F.R.D. 677 (S.D.N.Y. 1950); and Farmers Co-op Oil Co. v. Socony Vacuum Oil Co., 133 F.2d 101 (8 Cir. 1942).

[fol. 269] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,750 and 12,751

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NOERR MOTOR FREIGHT, INC., et al., Appellants in 12,750,

vs.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al., Appellants in 12,751.

---

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

JUDGMENT—December 10, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of July 22, 1958 and the order of July 31, 1958 in this cause be, and they are hereby affirmed, with costs.

December 10, 1959

[fol. 270] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 271]

SUPREME COURT OF THE UNITED STATES

No. 758, October Term, 1959

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EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Petitioners,

vs.

NOERR MOTOR FREIGHT, INC., et al.

---

ORDER ALLOWING CERTIORARI—April 18, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED
MAR. 3 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959.

No. 758 50

NOERR MOTOR FREIGHT, INC., KRAMER BROS. FREIGHT LINES, INC., PENNSYLVANIA MOTOR TRUCK ASSOCIATION, et al.,

*Respondents,*

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, et al., *Petitioners.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

NOERR MOTOR FREIGHT, INC., KRAMER BROS. FREIGHT LINES, INC., PENNSYLVANIA MOTOR TRUCK ASSOCIATION, ET AL.,

*Respondents,*

*v.*

EASTERN RAILROAD PRESIDENTS CONFERENCE, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,

*Petitioners.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

## OPINIONS BELOW.

The *per curiam* opinion of Circuit Judges McLaughlin and Staley and the dissenting opinion of Chief Judge Biggs of the United States Court of Appeals for the Third Circuit are reported at 273 F. 2d 218 and are printed in Appendix A to this petition, pages 23 and 28. The opinions of the United States District Court for the Eastern District of Pennsylvania are reported at 155 F. Supp. 768 and 166 F. Supp. 163 and are printed at pages 50a-185a of the Appellants' Appendix in No. 12,750 and at pages 345b-354b of the Appellants' Appendix in No. 12,751 of the court below.

## JURISDICTION.

The judgment of the court of appeals was entered on December 10, 1959 (Appendix B, page 46). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED.

1. Whether the courts below correctly held that petitioners violated the Sherman Act by engaging in a public relations campaign that sought public support for or opposition to state legislation affecting the competitive position of respondents' industry and that, according to the courts below, sought to injure "the good will of the long-haul trucking industry".

2. Whether under the Sherman Act an injunction may be issued which, among other things, enjoins a group of railroads and their officers and employees (1) from sponsoring, instigating, or supporting the enactment of legislation imposing weight, size, or other limitations on trucks or levying taxes of any kind on long-distance truckers, (2)

from engaging in public discussion of issues of public interest which may be found "to create resentment or hostility" to long-distance truckers "in the minds of the general public" or "in the minds of legislators, law enforcement officers, or other public officials, or members of any branch of government", and (3) from publishing "derogatory material" relating to long-distance truckers.

3. Whether a member of the trucking industry or a trade association of the trucking industry is "injured" in its individual "business or property", as those terms are used in the antitrust laws, by publicity concerning matters of public importance relating to that industry as a whole when the publicity did not refer to any particular member or its individual business relationships and, legislation aside, there was no evidence of loss to the business of any member as a result of the publicity.

## STATUTES INVOLVED.

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2, sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, and the First Amendment of the Constitution of the United States, all of which are set forth in Appendix C to this petition, page 47.

## STATEMENT OF THE CASE.

Petitioners, twenty-four eastern railroads, an association of their presidents (Eastern Railroad Presidents Conference, "ERPC"), and a public relations firm (Carl Byoir & Associates, "Byoir") were sued under the Sherman Act by some forty long-distance trucking companies and their trade association (Pennsylvania Motor Truck Association, "PMTA").[1] Petitioners have been held liable for substantial money damages and have been enjoined, among other things, from jointly supporting legislation that would impose taxes of any kind upon long-distance truckers or limit the size and weight of their trucks, and from engaging in any public discussion which is "derogatory" of, or which might create "resentment or hostility" toward, the truckers.

The facts and circumstances giving rise to this remarkable decision, which employs the Sherman Act to punish and restrain political and public relations activity, are as follows:

Since the 1930's and throughout the period covered by the complaint the growth of the long-haul trucking industry, largely at the expense of the railroads, has been phenomenal by any standard (¶¶ 9-11,[2] 263b; ¶ 10c, 297b; ¶ 15c, 299b; ¶ 20c, 300b). In the period following World War II there was an even greater contrast between the sharp decline of the railroads' business and the spectacular rise of the truckers'. By 1949 it had become clear to petitioners that this diversion of traffic had occurred because basic items in the cost of truck service were being controlled not by free economic forces but by what the state legisla-

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1. Petitioners and respondents are listed in Appendix D to this petition, page 49.

2. References to "¶" are to Findings of Fact made by the district court which appear in Volume I of Appellants' Appendix in No. 12,751 of the court of appeals.

tures could be persuaded to grant or withhold. In their pursuit of legislation that would improve their lot and allow them to take business from the railroads, the truckers had banded together to conduct public relations-legislative campaigns which had largely achieved two goals: first, obtaining legislative permission to use ever-larger and ever-heavier trucks carrying greater payloads; and, second, preventing higher truck fees and taxes so that the cost of building and maintaining highways used by inter-city trucks would continue to be defrayed principally from general tax revenues rather than from funds provided by the truckers and their customers (58a-59a; ¶ 30, 269b; ¶ 41c, 305b).

Petitioners realized that, since the truckers' competitive cost advantage had been legislatively created, it could be remedied only by action of the legislatures. To propose or oppose legislative measures effectively it was necessary to arouse public opinion. To this end ERPC, acting as spokesman for the eastern railroads, retained Byoir to undertake a public relations program (61a). Petitioners' theme was that heavy trucks damage existing highways and that the trucking industry does not pay its fair share of the cost of highway maintenance or of building new roads that have to be specially designed to accommodate increasingly heavier vehicles.

In publicizing this theme Byoir used what is sometimes called the "third-party technique", i.e., distributing and assisting others to distribute news releases, pamphlets, speeches, magazine articles, films, and other publicity materials, much of which had been written by, for, or with the assistance of Byoir. In states where it was active, Byoir sought out other persons and organizations willing to ally themselves with the railroads. For example, in opposing legislation in Pennsylvania that would increase truck weights, Byoir worked with, and sparked and publicized public utterances by, groups of farmers, municipal officials, and motorists, who had been long-standing opponents of

increased truck weights (¶ 35, 270b; ¶¶ 37, 39, 272b; 75b-83b; 62b-74b; 125b).

In many cases the material disseminated by these allies did not state that it had been instigated, prepared, or distributed by or on behalf of the petitioners. The ideas that were being presented to the general public stood a better chance of acceptance if not offered in the context of a dispute between trucks and railroads. The same reasoning was followed by respondents, who likewise employed the third-party technique in the anti-railroad campaigns in which they were engaged throughout the period to which this litigation relates (see Chief Judge Biggs' dissenting opinion, Appendix, p. 29; 110a; 136a; and findings at 320b-331b and 335b-340b).

The publicity materials disseminated by petitioners dealt only with the following subjects:[3]

(1) support for or opposition to specific legislative bills dealing with truck weights or taxes under consideration in various states;

(2) the relationship between highway maintenance and construction costs and the increased use of heavy trucks;

(3) the need for and sources of highway funds and the apportionment of taxes among highway users, including the argument that heavy trucks do not pay their fair share of highway costs;

(4) the effect of heavy trucks upon existing highways, the prevalence and reasons for truck overloading, and the enforcement of existing statutes; and

(5) highway dangers and congestion contributed to by heavy trucks.

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3. All the publicity material in the preparation or dissemination of which petitioners might be said to have played any part whatever has been reproduced in Volumes 2 and 3 of Appellants' Appendix in No. 12,751 of the court below.

None of this publicity was directed by name, or otherwise, at any individual trucker and respondents never challenged its truthfulness.[4]

The courts below found for respondents, holding that it is a violation of the Sherman Act to conduct a public relations campaign "designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under the guise of public spirited organizations and with the defendants' interest concealed" (Appendix, pp. 25-26).

Although they did not recognize that petitioners' public relations campaign was solely legislative in nature, the courts below did not and could not say that there is any conduct involved in this case other than the public relations campaign described above. That is all the case involves. It is therefore immaterial whether the imprecise and ambiguous language of the courts below is said to characterize that public relations campaign as (1) a legislative campaign having, as an unavoidable by-product, some extra-legislative effect upon respondents' customers or (2) a public relations campaign intentionally designed to have, simultaneously, both legislative and extra-legislative consequences. The undisputed facts show that the conduct held to constitute a violation of the Sherman Act, no matter how characterized, was nothing more nor less than a public relations campaign that called attention to the prob-

4. Apart from their attack on the so-called "third-party technique", respondents did not challenge the accuracy of petitioners' publicity. When petitioners offered to prove the facts were as they had stated, the trial judge rejected their offer, saying (Transcript, 3385):

> "I think you have put in sufficient testimony to establish the truth of what you started to establish, that the things you said about the truckers, in defense of persons taking a public position, are true."

lems of highway congestion and safety caused by heavy trucks and argued that the trucking industry does not pay its fair share of highway maintenance and construction costs and that heavy trucks damage existing highways, all without reference to any particular trucker.

Because each trucking company respondent had expressly stipulated that the only damages claimed by it were those resulting from the veto of Pennsylvania's Senate Bill 615, which would have been beneficial to it (47b), and because such damages are not legally compensable, the district court awarded only nominal damages to the trucker respondents. However, it awarded to their trade association, PMTA, a counsel fee and treble damages of $652,074 representing, oddly enough, expenses incurred by the association in conducting its own public relations campaign. Further the court issued the remarkable injunction which is discussed in detail at page 13 of this petition.[5]

Upon appeal by both sides,[6] the decision was affirmed by Circuit Judges McLaughlin and Staley in a *per curiam* opinion which, considering the novelty and importance of the issues presented, can only be described as perfunctory. Chief Judge Biggs' vigorous dissent explains why "the decision of the court below is disastrous" and does indeed "merit the attention of the reviewing Court" (Appendix, page 28).

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5. The district court also dismissed petitioners' counterclaim which was based upon conduct of respondents similar to that which formed the basis of the respondents' complaint. See Chief Judge Biggs' dissenting opinion, Appendix, page 38, note 15.

6. The respondents appealed from the refusal of the district court to award substantial damages to the individual trucking companies for the injury allegedly suffered because the governor of Pennsylvania vetoed legislation, S. B. 615, which would have increased the permissible gross weight of trucks.

## REASONS FOR GRANTING THE WRIT.

### I. The Holding Below That the Sherman Act Applies to the Public Discussion of Questions of Public Importance Is an Unwarranted Extension of the Statute Which Is Inconsistent With the Decisions of This Court and Which Raises Serious Questions of Constitutional Law.

Petitioners submit that this is not just another routine antitrust case. The unprecedented decision in this case extends the operation of the Sherman Act to the relations between business on the one hand and the public and government on the other. In an era when both public opinion and state and federal legislatures assert ever increasing influence and power over the conduct of more and more business activity, the courts below have used the Sherman Act to impose stringent limitations upon the appeals that businessmen may make and the information they may disseminate to the public and to legislators in matters of public concern. Nothing in the statute itself, its legislative history, or the decisions of this Court suggests that the statute is designed to extend to and require the regulation of political and public relations activities on issues of public importance. As Chief Judge Biggs put it: "If the law is to be changed in these important respects the revisions should be effected expressly by the Supreme Court . . . ." Appendix, page 33.

Until this case was decided, it was clear that a restraint imposed by legislative action was not a restraint of trade within the scope of the Sherman Act, no matter how injurious its consequences might have been to particular groups and, therefore, the advocacy of such a legislative restraint was not a basis for Sherman Act liability, notwithstanding the competitive motive of the advocates. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358 (1909); *Olsen v. Smith*, 195 U. S. 332, 344-345 (1904);

*Parker v. Brown*, 317 U. S. 341, 351 (1943); *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560 (1939); *Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954), all of which are discussed in Chief Judge Biggs' opinion at Appendix, pages 34-38.

The courts below rejected these settled principles[7] apparently because of their conclusion that the petitioners' public relations campaign was not entirely legislative but that petitioners had also acted with the extra-legislative purpose and effect of impairing "the good will of the long-haul trucking industry". As we shall show later that conclusion is unwarranted, but quite apart from the merits of that conclusion, the holding below involves a fundamental error of law. That error lies in extension of the Sherman Act to a public relations campaign which consisted of nothing more than the public discussion of whether heavy trucks damage roads and whether the trucking industry pays its fair share of highway maintenance and building costs.

This novel holding, which construes the Sherman Act as designed to regulate the public discussion of issues of political importance, is a drastic departure from the prior decisions of this Court. Since *Standard Oil Co. v. United States*, 221 U. S. 1 (1911), the application of the Sherman Act has been confined to activities and practices that are non-political in character and which either directly or by analogy could be regarded as "comparable to restraints deemed illegal at common law", namely, "contracts for the

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7. In the words of the district court:

> ". . . even if their [petitioners'] activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws." (149a)

This misapprehension of the law was first voiced by the district court in its opinion denying motions to dismiss the complaint. 113 F. Supp. 737, 742 (1953).

The like view of the majority of the court of appeals appears in its *per curiam* opinion at note 3, Appendix, page 26.

restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and like practices, which lead to raised prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market." *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 497-498 (1940).

Admitting that the statute is sufficiently flexible and adaptable to be extended to new practices that properly fall within its scope, nothing in the statute, in its history, or in the authoritative decisions construing it indicates that the statute was intended to reach public relations and political activities dealing with important issues of public concern. The courts below attempt to justify extension of the antitrust laws to the present case on the ground that petitioners' motive was to harm their competitors. But this suggestion that petitioners' activities violated the Sherman Act because they were intended to benefit the economic interests of one industry at the expense of the interests of another assumes a general rule of law that has never before been applied in antitrust cases and one that would place extraordinary restrictions upon political activity and public debate.

Such an intent to injure a competing group inevitably exists in almost all inter-industry controversies—coal against oil and gas; domestic manufacturers against importers; public against private electric power; and in the competitive rivalry among all forms of transportation: railroads, barge lines, steamship lines, scheduled and non-scheduled airlines, and motor carriers. The inevitable effect of the decisions below is to create doubt and confusion as to what are permissible activities in all of these and other wide and complex areas.

Respondents' insistence, despite their own resort to the same publicity methods, that the so-called third-party technique is unlawful invokes a standard of illegality that is irrelevant to construction of the Sherman Act. The pro-

priety or legality of a public relations technique, measured by standards extraneous to the Sherman Act, is not determinative of liability under the antitrust laws. Trespass, the forcible seizure of property, homicide, and other violence are concededly unlawful but they do not in themselves provide a basis for antitrust liability even if they are intended to and do have economic consequences that are harmful to others. *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940); *Hunt v. Crumboch*, 143 F. 2d 902, 904 (3d Cir. 1944), *aff'd*, 325 U. S. 821, 826 (1945).

In the case at bar, petitioners advanced the ideas that the truckers should bear a greater share of the cost of constructing and maintaining highways and that the size and weight of trucks should be limited. These proposals have no less protection under the First Amendment than other political or social or religious ideas. *Thomas v. Collins*, 323 U. S. 516, 530-531 (1945). That the discussion is impelled by a profit or commercial motive makes no difference. *Cammarano v. United States*, 358 U. S. 498, 514 (1959) (concurring opinion); *Smith v. California*, 28 U. S. L. Week 4033, 4034 (U. S. Dec. 14, 1959). Certainly the subjects of petitioners' public relations campaign were important matters of legitimate public and legislative concern, about which petitioners were and are constitutionally entitled to voice their views both individually, together, and with others. *United States v. CIO*, 335 U. S. 106, 143-144 (1948) (concurring opinion).

Under our republican form of government, legislation can be intelligently devised and enacted only if full and free public discussion is permitted and encouraged. Where as here an entire industry is being heavily penalized by existing legislative policy which unfairly grants economic advantages to a growing competing industry, public policy demands at the minimum that both sides of the controversy should be permitted to be freely aired. In an inter-industry controversy such activity on each side must inevitably be joint and cooperative. What the decisions below have held is that such industry action can only be undertaken at the

peril of being subsequenty held in violation of the Sherman Act if a court concludes that the action was colored in any way by a purpose to benefit the economic interests of one industry at the expense of a competing industry.

The gist of the decision below is revealed far more clearly in the words of the injunctive decree than it is in the words of either prevailing opinion below. The significance of the decree transcends any error, or indeed abuse, in the exercise of judicial discretion in framing relief. Rather, its provisions expose the fundamental error in the application of the antitrust laws to this case. If, as it must, the decree mirrors the acts of petitioners which were thought to create liability and if, as it must, the decree describes what the court of appeals regarded as "continuing illegal activities" justifying injunctive relief (Appendix, page 27), then it follows that the decision below is flatly inconsistent with the First Amendment guarantees of freedom of speech and the right of petition.

The decree, in sweeping terms, tells petitioners, their officers and employees that they, jointly, may take no action and make no statement that might subsequently be determined to have created "resentment or hostility" toward long-haul truckers in the minds of the public, or even in the minds of "legislators . . . or other public officials" (Par. IV(A)(1), (2), (3), 189a-190a). They may not publish any material that might be deemed "derogatory" of the respondents or their business (Par. IV(A)(4), 190a) nor play any part in publicizing material "relating to plaintiffs or their business" without disclosing their participation therein (Par. IV(A)(5), 190a). They may not seek out other organizations "to carry out any activity prohibited by [the decree] without publicly disclosing the relationship between defendants and such organizations" (Par. IV(A)(6), 190a). They are even denied the right of "supporting any legislation for the enactment of . . . taxes of any kind to be levied on plaintiffs or their business, or weight, size or

other truck limitations" (Par. IV(A)(9), 190a).[8] And these prohibitions apply not only to any such activities directed against respondents by name but to "those generally directed against long haul truckers as a group" as well (Par. IV(B), 191a).

These prohibitions effect naked "previous restraints" contrary to the teaching of *Near v. Minnesota*, 283 U. S. 697, 713 (1931). They are such that whatever petitioners and their employees may say about public issues affecting them and their competitors will be said under pain of prosecution for contempt. Certainly they may no longer argue to the public that highway user charges are unfairly distributed or that the public is paying a hidden subsidy to the railroads' competitors. Under this decree there will be no public debate of these issues. The courts below have rejected the First Amendment hypothesis that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies". *Dennis v. United States*, 341 U. S. 494, 503 (1951). The public and legislatures are to be left with but one side of the story. See Chief Judge Biggs' dissenting opinion, Appendix, page 41.

In extending the Sherman Act to proscribe public discussion of public issues the *per curiam* opinion of the court of appeals simply ignores the constitutional problems, rather than giving the statute "an allowable construction that fairly avoids a constitutional issue". *United States v. CIO*, 335 U. S. 106, 129 (1948) (concurring opinion). Apparently this is because the court disapproved of the third-party technique which petitioners employed in their public relations campaign. Appendix, page 26, note 2. But disapproval of petitioners' methods does not warrant a con-

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8. This paragraph of the final decree purports to save to the petitioners the right to oppose the repeal of existing taxes or truck limitations if such opposition "be openly and publicly made in the name of the defendants", but it denies to the petitioners the right to sponsor or support new legislation adversely affecting trucks.

struction of the Sherman Act which brings its general terms into conflict with the First Amendment. Even Federal statutes and Congressional resolutions specifically directed to the subject of identification of persons attempting to influence public opinion and legislation have been narrowly construed in order to avoid constitutional issues. Those statutes and resolutions were held to authorize the compelling of a "modicum of information" only from persons engaged in directly "buttonholing" legislators. The constitutional problem was avoided by leaving untouched "the influences that form public opinion". *United States v. Harriss*, 347 U. S. 612, 625-626, 628-636 (1954); *United States v. Rumely*, 345 U. S. 41, 47 (1953). Certainly the general language of the Sherman Act, which by its terms and history has no application to this field, should not be construed to authorize judicial regulation of the techniques to be employed in appeals to public opinion.

So far, for the purpose of argument, petitioners have assumed the correctness of the conclusion of the courts below that their public relations campaign was not entirely legislative in nature and effect. In fact that conclusion is erroneous. At the trial, respondents never offered any evidence nor advanced any theory to support such a conclusion.[9] On the contrary, the solely legislative nature and

9. During and following the trial, respondents agreed with petitioners' position that nothing other than activity in support of legislation was involved. In Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Under Rule 41(b), respondents said (page 6):

> "There can be no dispute that the ERPC program was designed to foster or maintain restrictive legislation against the trucking industry. As Mr. Price said [in his opening statement for petitioners]: 'The entire purpose of this program was legislative, either maintenance of the status quo or a change in the way that I have described; . . .'"

Again and again, in that brief and in their brief in support of their requests for findings, respondents stated petitioners' goal only as legislation:

> "The objective of the campaign was to effect legislation to harass the long-haul truckers . . ."

effect of the petitioners' activities were sharply emphasized by respondents' stipulation that the only damages the truckers claimed were those resulting from the veto of a bill in the Pennsylvania legislature (S. B. 615). See Chief Judge Biggs' dissenting opinion at Appendix, page 43, note 20.

Moreover, despite its conclusion that the petitioners' public relations campaign was also directed to "vilification", the district court could find only legislative terms to describe the campaign's "results" and "accomplishments": the reduction or preservation of existing statutory truck weight limits and the adoption of higher truck fees and taxes (67a, 73a, 74a, 76a, 102a). What the trial judge called the "strong base of public resentment" was, in his view, only the foundation of a pyramid of activity "to convince people and legislators" that legislative restrictions should be placed upon trucks (106a):

> "The cap of the pyramid, of course, was the projected legislation and the cap of the pyramid differed in each state. In New Jersey it was increased license fees and lowering of weights. In New York it was the weight-distance tax. In Ohio it was first a substantial increase in license fees and next the campaign for the weight-distance tax. In Pennsylvania it was the veto by Governor Fine of the so-called Big Truck Bill to be immediately followed by a campaign for the weight-distance tax."

Both courts below recognized that the public relations campaign was at least in large part legislative in its purpose. For example, the *per curiam* opinion of the court of appeals not only expressly stated that "the attempt to influence legislation" was a "vital element of defendants' conspiracy" but even characterized the campaign as one "designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating

public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads", a sequence of events and words which themselves disclose the essentially legislative purpose of the campaign (Appendix, pages 25-26). Therefore, even if the campaign had extra-legislative purposes and consequences, they must be regarded as no more than an unavoidable by-product of appeals to the public and to state legislatures, appeals designed to influence legislative action.

But whatever interpretation is given the holdings of the courts below, their net effect is to apply the Sherman Act to punish and enjoin public discussion concerning important public and political issues. This, we submit, extends the statute into areas it was never intended to reach and, in so doing, construes it in a manner which conflicts with the First Amendment freedoms of speech, press, assembly, and petition.

**II. The Holding Below That Comment Concerning an Entire Industry "Injured" the "Business or Property" of Each Member of That Industry Unsettles Established and Important Legal Principles Affecting the Administration of the Antitrust Laws.**

Another startling concept advanced in the courts below is the conclusion that the impact of petitioners' public comment about the entire long-haul trucking industry and legislation affecting it constituted the legally cognizable "injury" to the "business or property" which each respondent trucker must show in order to maintain this private antitrust action (15 U. S. C. §§ 15, 26). This concept shatters established legal principles applicable alike to private antitrust and to common-law tort actions.

The district court asserted that the entire long-haul trucking industry had been "vilified" by the petitioners' dissemination of publicity that consisted of information,

admittedly truthful, and argument in support of the position that heavy trucks damage highways and that the trucking industry does not pay its fair share of highway maintenance and construction costs, none of which referred to any individual trucker in any way. This "vilification" is said to have caused each individual member of the industry not only a loss of good will with the public but a loss of good will with its customers. This conclusion is inconsistent with the fact that no loss of business was shown to have been sustained by any individual respondent as a result of petitioners' publicity[10] and the fact that respondents themselves had stipulated that the only damages claimed by the truckers were those resulting from the veto of certain Pennsylvania legislation (Stipulation, Par. 3, 47b). However, there are other sound reasons why no legally cognizable injury to "good will" could be said to have arisen from the dissemination of petitioners' publicity materials.

To start with, the concept of "industry good will" which the district court has first created and then invested with the quality of legally cognizable property (124a-125a) is the antithesis of the concept of "good will" that has heretofore existed. Until this case was decided, good will was recognized only as an appurtenance to an individual business entity which distinguished that entity from others in the same industry. By definition it cannot be shared by all those engaged in an industry. No such interest as an industry's good will is recognized by the law as subject to legal injury. See 1 Nims, *Unfair Competition and Trademarks* (4th ed. 1947), § 13, p. 79.

Moreover, even if petitioners' publicity had "vilified" the entire long-haul trucking industry, although petitioners do not agree that it did, the individual business good will of any individual trucker cannot be said to have been vilified or injured by publicity relating to an entire industry which

10. See Chief Judge Biggs' dissenting opinion, Appendix, page 45.

neither mentions him by name nor otherwise refers to him. Compare *Restatement, Torts,* § 564, comment *c; Service Parking Corp. v. Washington Times Co.,* 92 F. 2d 502 (D. C. Cir. 1937); *Fowler v. Curtis Publishing Co.,* 78 F. Supp. 303, 305 (D. D. C. 1948), *aff'd,* 182 F. 2d 377 (D. C. Cir. 1950); *Watts-Wagner Co. v. General Motors Corp.,* 64 F. Supp. 506 (S. D. N. Y. 1945); *Neiman-Marcus v. Lait,* 13 F. R. D. 311 (S. D. N. Y. 1952).

What respondents really sought, and have in large measure been granted by the district court's decree, is the right to preserve their industry free of criticism. But even had respondents shown that some extra-legislative harm to their individual businesses resulted from public criticism of their industry, they could not recover for it. No private plaintiff has any "legal right" to insist that public questions shall not be discussed in public. Indeed, by their use of the public highways, respondents invited the discussion involved here. Compare *Golden North Airways v. Tanana Publishing Co.,* 218 F. 2d 612 (9th Cir. 1954); *Golson v. Hearst Corp.,* 128 F. Supp. 110, 112 (S. D. N. Y. 1954).

Thus, the Sherman Act has been rewritten and common-law concepts disregarded. A cause of action has been created for a plaintiff, not for any injury to his own individual business or property, but for an injury to the supposed "good will" of the entire long-haul trucking industry of which he was merely a part, and for a trade association which was not even engaged in the trucking business.

## CONCLUSION.

The impact of this decision upon business, the public, and government far transcends the consequences to the parties to this particular litigation. The decision rests on reasoning which applies alike to the activities of both plaintiffs and defendants in this case, to the almost daily efforts of business and industry seeking public and legislative acceptance of their points of view, and, as well, to the conduct of all individuals, associations, or groups, who first seek

public approval and, ultimately, legislative acceptance of ideas and programs that they believe desirable and beneficial for themselves, notwithstanding the almost always harmful effect upon some others. It will directly affect the legality of any activity of such a public relations or legislative character which is prompted by economic self-interest and which may also be adverse to the interests of a competing industry. The familiar public and legislative battles between the dairy and the oleomargarine interests, the tariff struggles between domestic manufacturers and importers of foreign goods, and other like conflicts are now proscribed.

If the activities of citizens in discussing issues of public importance and in petitioning their government for redress are to be regulated under the antitrust laws, this result should not rest on the four-page *per curiam* opinion of the court of appeals which does not even consider the fundamental and far reaching questions of statutory construction and constitutional interpretation which are inextricably involved in the decision of this case.

For the reasons set forth above, we submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2, 1960.

## APPENDIX A.

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## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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Nos. 12,750 and 12,751

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NOERR MOTOR FREIGHT, INC., ET AL.,
*Appellants in No. 12,750,*

*v.*

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.,
*Appellants in No. 12,751,*

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Argued June 8, 1959

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

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### OPINION OF THE COURT

(Filed December 10, 1959)

PER CURIAM.

In this antitrust action for an injunction and treble damages,[1] forty-one long distance trucking companies and

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1 Sherman Act, 15 U.S.C.A. § 1 et seq.; Clayton Act, 15 U.S.C.A. § 15.

their trade association, Pennsylvania Motor Truck Association, sued twenty-four major eastern railroads, Eastern Railroad Presidents Conference and Carl Byoir Associates, Inc. a New York corporation, the public relations agency for the Conference.

Plaintiffs charged in their complaint (filed April 30, 1953) inter alia, that in or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the antitrust laws of the United States, aimed at destroying the plaintiffs and those similarly situated as competitors in the field of the hauling of freight, and at carving out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the railroads would have a monopoly on freight hauling in interstate commerce; that the defendant Railroads worked for those ends through the defendant Conference; that the latter retained defendant Byoir as publicity agent to carry said conspiracy into effect; that thereafter the Conference, its committees, members thereof, the defendant Railroads, their presidents and trustees and other individual defendants and Byoir, with divers other persons unknown to plaintiffs, have acted in combination and concert to obtain the objectives of the conspiracy. The means used are detailed in the complaint; a continuing conspiracy to the date of the complaint is alleged; damage to each of the plaintiffs is asserted, irreparable, continuing injury stated and an injunction asked. Defendants denied the charges of the complaint. In 1956, after the case had been assigned a trial date, October 1, 1956, and while discovery procedures were pending, some of the Railroads and the Conference sought permission to and were allowed to file a counterclaim against the plaintiffs. This claimed that plaintiffs were engaged in an illegal conspiracy to obtain a monopoly of the long haul freight industry in the same part of the United States as set out in the complaint and to force the Railroads out of that part of the transportation business in that area.

The case went to trial before Judge Clary on October 1, 1956 and lasted almost four months. There were many witnesses and 968 exhibits. On October 10, 1957, the court in an exhaustive opinion (it covers 73 pages in 155 F.Supp. 768-841) found in favor of the plaintiffs against all the defendants on plaintiffs' cause of action and against the defendant counterclaimants and in favor of the plaintiffs on the counterclaim.

Soundly based on substantial evidence, the trial court found that the Railroads and Byoir, as contended, had conspired in unreasonable restraint of trade to injure the truckers in their competitive position in the long haul freight industry in the northeastern part of the United States; that their immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilize the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers; that instead of meeting the truckers competition in the long haul freight field, the Railroads and Byoir combined to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the Railroads; that they adopted and carried out a full program to obtain that objective; that serious private injury to the truckers was accomplished, definitely a loss of good will to the trucking industry and in some instances that loss of good will being extreme; that their actions destroyed to a large extent the public confidence which the truckers had fairly earned and which might have been increased in the light of the innumerable beneficial accomplishments of the truckers in long haul transportation.

The court found on overwhelming evidence that it was no series of individual conspiracies in the various states involved but one large ever-growing conspiracy as charged having as its goal to injure and/or destroy the long haul trucking industry and that the main means used to attain such end was primarily a campaign designed to destroy the

good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under the guise of public spirited organizations and with the defendants' interest concealed.[2]

The record shows the defendants' antitrust conspiracy completely established against all the defendants named in the decree.[3] It shows both legal and illegal methods to

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2 The third party apparatus employed by the defendants, while concealing their own adroit manipulation thereof, in seeking to procure legislative and executive action is contrary to public policy and illegal. Marshall v. The B. & O. Railroad Co., 16 How. 314, 335 (1853); Angle v. Chicago, St. Paul, etc. R. Co., 151 U.S. 1 (1893); Commissioner of Internal Revenue v. Textile Mills Securities Corp., 117 F.2d 62 (3 Cir. 1940), affirmed 314 U.S. 326 (1941). Cf. United States v. Silliman, 167 F.2d 607 (3 Cir. 1948), cert. den. 335 U.S. 825 (1948).

3 The attempt to influence legislation and executive action while rightly held by the trial court to be less important than the direct vilification of the long haul trucking industry was nevertheless properly found to be a vital element of the defendants' conspiracy to injure and/or destroy that group. Even assuming the brazen interference with legislation and executive action in this instance was lawful, its entire motivation was shown to emanate from the conspiracy charged. It was part of defendants' scheme to wreck their competitior, to monopolize that branch of commerce for themselves. As such it violated the Sherman Act. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 497-502 (1949); United States v. Krasnov, 143 F.Supp. 184 (E.D.Pa. 1956), affirmed 355 U.S. 5 (1957); Atchison, Topeka & Santa Fe Railway v. Aircoach Transport Association, 253 F.2d 877, 887 (Ct. App. D.C. 1958).

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), urged below and here by the Railroads, has no real application to the facts before us. The later decisions of the Supreme Court in United States v. Sisal Sales Corporation, 274 U.S. 268 (1927) and Steele v. Bulova Watch Co., 344 U.S. 280 (1952) clearly indicate that the Banana Company opinion is limited to the proposition that the Sherman Act cannot be invoked against persuading a foreign sovereign to act. Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co., 214 F.2d 413 (5 Cir. 1954) is the other decision stressed by the Railroads in the district court and on appeal. That too is hardly an authority for anything pertinent under the in-

obtain the illegal objective of injuring and/or destroying the long haul trucking industry. It shows injury to the plaintiffs and to the public. It justifies the injunctive relief against continuing illegal activities of the defendants. It justifies the compensatory damages (trebled by statute) allowed plaintiff Pennsylvania Motor Truck Association, together with costs and counsel fees. It justifies the holding of the district court that the other plaintiffs, by reason of the stipulation which is very clear and is part of the record, are only entitled to nominal damages. It justifies the dismissal of the counterclaim, which action is not disputed by the Railroads except in line with their argument that the counterclaim is similar in content to the plaintiffs' claim.

Though we think it plain from what we have said, it might be well to expressly note that the suggestion that the Railroads' entire activity, spearheaded by Byoir, was merely a perfectly legitimate public relations campaign for legislation is fanciful in view of the impressive documentation in the record of the finding of the trial court "• • • *that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the*

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stant unescapable facts. There the complaint made no allegation that the conspiracy was directed to ruining a competitor in his business. The later case of Crummer v. Du Pont, 223 F.2d 238 (5 Cir. 1955) and 255 F.2d 425 (5 Cir. 1958), cert. den. 358 U.S. 884 (1958), leaves no doubt but that as of now in the Fifth Circuit Court of Appeals, a conspiracy to drive a competitor out of business is a violation of the Sherman Act even though, as in Crummer, its most important element was the obtainment of its objective by secretly moving under the guise and protection of the public interest and through the public authorities.

*guardian of the public welfare, as they have so earnestly asserted.*" (Emphasis supplied).

Judge Clary's opinion is soundly predicated on the facts and law of this litigation. We are in accord with it. The decree and orders of the district court of July 22, 1958 and July 31, 1958 will be affirmed.

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BIGGS, *Chief Judge*, dissenting.

The case at bar merits the attention of the reviewing Court. The record demonstrates that no cognizable offense has been proved under Section 1 or Section 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and that therefore relief cannot be granted to the plaintiffs under Sections 4 and 16 of the Clayton Act. 15 U.S.C.A. §§ 15 and 26. Moreover, the reach of the decision of the court below is disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation. If the interpretation of the court below and of this court be correct the reach of the First Amendment which guarantees freedom of petition will be unduly limited and to an extent at least, destroyed. Rights guaranteed to the States and to the people by the Tenth Amendment will be endamaged. Heavy sanctions, criminal as well as civil, can be imposed on persons who seek the enactment of laws by Congress or by the legislatures of the States. I shall endeavor to deal first with what can perhaps be properly described as "conventional" antitrust law in relation to the case at bar and at a later point in this opinion will discuss the application of the constitutional guarantees referred to.

What the record proves is the following. Certain interstate trucking companies [1] were engaged in hot economic

1 Represented by Pennsylvania, Motor Truck Association (PMTA).

competition with twenty-four major eastern railroads [2] in the interstate transportation of long-haul freight. The Railroads and the Truckers as groups were avidly desirous of increasing their own respective interstate freight haulage and profits and decreasing those of the competing group. Both Railroads and Truckers hired public relations agencies to aid them. The ERPC engaged Byoir. PMTA engaged Allied Public Relations Associates. The methods employed by the public relations agencies of both the Railroads and the Truckers left much to be desired in respect to moral consciousness. Sources of propaganda were concealed by both sides by the use of the so-called "third-party" technique.

Both Railroads and Truckers and their agencies desired to influence public opinion in order to increase their own good will and to damage that of each other and thereby to procure legislation favorable to themselves and unfavorable to the competing group.[3] There was no difference in substance between the methods employed by Byoir for the Railroads and those employed by Allied Public Relations Associates for the Truckers except that Byoir was more vigorous, more vocal, and more effective. It was a no-holds-barred fight by both sides. The methods employed might well cause justifiable fear to those concerned with the viability of our representative form of government.

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2 Represented by Eastern Railroad Presidents Conference (ERPC).

3 A typical example is supplied by Senate Bill No. 615, Session of 1951 of the General Assembly of Pennsylvania, referred to from time to time in the testimony as the "Big Truck Bill", caused to be introduced by the Truckers, which would have raised the permissible weight limits of heavy trucks from 45,000 to 60,000 pounds. The defendants procured the veto of this bill by Governor Fine. A somewhat similar bill, also proposed by the Truckers, was "Bill A-13" in the New Jersey Legislature. Similar legislation was also before the legislatures of New York and Ohio. I shall not detail the various bills in the various State legislatures involved. These are set out in full, with many allied matters, in the opinions of the court below. See 155 F. Supp. 768, and opinion on damages, 166 F. Supp. 166.

### *Conventional Principles of Law Hitherto Deemed Applicable to Section 1 and Section 2 of Sherman Act Suits.*

As has been said, the action is based on Sections 1 and 2 of the Sherman Act.[4] It is necessary to discuss the applicability of both sections and it is more convenient to proceed first with a discussion of Section 2. The Truckers' case is deficient when viewed in the light of Section 2, the "Monopoly" section, of the Sherman Act. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ." The offense of monopolizing means ". . . to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power."[5] American Tobacco Co. v. U.S., 328 U.S. 781, 809 (1946). Since the Railroads have not effected a monopoly on long-haul freight traffic or destroyed the Truckers' business[6] only an attempt to monopolize or of a conspiracy to attempt to monopolize can be proved against

4 It should be noted that neither the opinion of the court below, 155 F. Supp. 768, nor that of this court, pinpoints whether the action is sustained under Section 1 or Section 2 of the Sherman Act.

5 The complaint alleges a conspiracy to create a monopoly. See paragraphs 12, 13 and 14 of the complaint. I assume therefore that the action at bar was one brought under Section 2 of the Sherman Act but I make no point of any deficiency in pleading as will appear from this opinion in the discussion of the applicability of Section 1 of the Sherman Act, the "restraint of trade" section.

6 Proof in the record aside, the court below and this court are entitled to take judicial notice that the Railroads have not driven the Truckers out of business.

them.[7] A necessary element of an attempt to monopolize is a specific intent to effect that result. United States v. Columbia Steel Co., 334 U.S. 495, 531-534 (1948).

This leads to the issue which is dispositive of the Section 2 phase of the instant case. Can an attempt to monopolize the transportation of long haul freight in the sense required by Section 2 be inferred from the evidence? The elements necessary to establish an attempt to monopolize in violation of Section 2 were set out in classic form in Swift and Company v. United States, 196 U.S. 375, 396 (1905), and have remained unchanged. In the opinion last cited the Supreme Court said: "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." Thus it is clear that in addition to

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7 The circumstances are peculiarly unfitted for the maintenance of a Section 2 case. We do not have before us a situation where one corporation, or even a few corporations, attempt to eliminate all competition so that it, or they will be left with unbridled power over prices, output, and entry into the competitive field. An entire section of what may be called the "transportation industry" consisting of many railroads is accused of trying to eliminate another section of the transportation industry, the Truckers, a situation that as far as research indicates has never previously resulted in successful antitrust litigation. Even if the Railroads had actually eliminated the Truckers' competition completely the Railroads' position would be far different than that of the successful monopolist since there still would be competition among the various railroads. Furthermore the interstate ground transportation industry is a regulated industry, with almost every phase of its activity controlled by the Interstate Commerce Commission.

an intent to monopolize, the evidence must prove that the activities of defendants in a Section 2 case create a dangerous probability of monopoly. See again United States v. Columbia Steel Co., *supra*.

The court below found as a fact that vigorous efforts were made by the Railroads and Byoir to injure the Truckers' good will business-wise, to decrease the number of the Truckers' customers, to pass anti-trucking legislation and to increase trucking costs and to prevent the enactment of legislation which would decrease those costs. The proof is not sufficient in the instant case to sustain a Section 2 charge. There is no evidence in this record proving that the efforts of the Truckers or Byoir were liable to bring the long-haul trucking industry to an end. There is no showing that even the most optimistic of the Railroads or Byoir intended, expected, or even hoped, to destroy interstate trucking. The circumstances at bar do not traverse the limitations imposed by the Columbia Steel Co. decision. Moreover, there is no proof whatsoever of a "dangerous probability" that a monopoly could result as required by the Swift decision. Under the circumstances a cause of action based on Section 2 falls. If the judgment of the court below against the Railroads is to be sustained it must be under Section 1 of the Sherman Act.

But the Truckers have not proved a cause of action cognizable under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States. . . ." As was said in Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those combinations which 'unreasonably' restrain competition". Mr. Justice Black went on to say that certain agreements or practices have such a pernicious effect on competition that they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have

caused or the business excuse for their use". Mr. Justice Black then designates the kind of practices which the courts have deemed to be unlawful in and of themselves and cites the relevant cases.[8] The acts of the Railroads and Byoir were not proved to be such as to cause the case at bar to fall within the category of cases where the principle of unreasonableness is automatically applicable. The court below so found.[9] The issue then becomes: Did the combination or conspiracy here "unreasonably restrain competition"? The record fails to demonstrate that the Railroads and Byoir did so here.

Moreover, and quite aside from the foregoing, restraints which constitute violations of Section 1 are those which involve conspiracies of members of an industry to follow a mutually self-restricting course in the area of their own competence in order to obtain unlawful commercial advantages over customers or suppliers. The plan here, as proved, was to decrease the business of fellow members of the interstate transportation industry, the Truckers. Furthermore the essence of the campaign was not joint action for any one of the Railroads acting alone could have achieved the result which was attained. Any Railroad could have hired Byoir. If the law is to be changed in these important respects the revision should be effected expressly by the Supreme Court and not by this tribunal.[10]

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8 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940), price-fixing; United States v. Addyston Pipe & Steel Co., 85 F. 271 (1898), aff'd 175 U.S. 211 (1899), division of markets; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), group boycotts; International Salt Co. v. United States, 332 U.S. 392 (1947), tying arrangements.

9 See 155 F. Supp. at p. 816.

10 See *e.g.* United States v. Patten, 226 U.S. 525 (1913), market cornering; Addyston Pipe & Steel Co. v. United States, note 8, *supra;* Fashion Originators' Guild v. Federal Trade Commission, note 8, *supra;* United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), market division; United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), price-fixing, output restrictions; United States v. Paramount Pictures, 334 U.S. 131 (1948), price-fixing and United States v. Frankfort Distilleries, 324 U.S. 293 (1945), resale price maintenance.

But without regard to what I have termed "conventional" antitrust law and whether the suit is sought to be maintained under Section 1 or Section 2, or both sections, I am of the view that the provisions of the Sherman Act are not applicable here because of what is set out in the following three headings of this opinion.

*Principles of Antitrust Law Applicable Under the Circumstances at Bar Where Legislative Action Was Invoked or Avoided.*

The objectives of the Railroads, as found by the court below, are set out and discussed hereinafter under the heading "As to Damages". It is desirable to state again at this point that the principal objective of both Railroads and Truckers was to achieve legislation which would increase their own profits from interstate freight haulage and decrease those of the competing group. The actions of the Railroads and Byoir in this respect were described by the court below as the "fomenting of governmental restriction . . . increasing the cost of operation and/or preventing the carrying of greater loads" by the Truckers, and was held to be an unreasonable restriction of competition.[11] The public interest must be deemed, of course, to be involved here as it is in every antitrust suit but there is also a potent public interest in the right of the individual to act in support of or in opposition to legislation. Does the public interest in this latter right rise superior to the public interest sought to be preserved by the antitrust laws? Does the Sherman Act apply to legislative restraints or to private activity in support of such restraints? I think the decisions demonstrate that the Sherman Act cannot be employed to make such private activities illegal and that whether successful or unsuccessful they do not constitute unreasonable restraints on interstate commerce.

In Olsen v. Smith, 195 U.S. 332, 344-345 (1904), where the restraint was imposed by a Texas statute, it was held

11 See 155 F. Supp. at p. 833.

that the intent of Congress in enacting the Sherman Act was to prevent private, not governmental, actions in restraint of competition.[12] In American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909), the Supreme Court dealt with a very similar issue, Costa Rica, by what was in effect law, having confiscated property of one corporation at the instigation of a trade rival. Mr. Justice Holmes said that "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort . . . is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

In Parker v. Brown, 317 U.S. 341, 351 (1943), California had passed a proration statute which restricted competition among raisin growers and fixed prices. Mr. Chief Justice Stone stated: "The Sherman Act makes no mention of the state, as such, and gives no hint that it was intended to restrain state action or official action directed by a state."

There is no doubt that a State of the United State in the exercise of its public power may legislate for the health, safety or welfare of its people or that a State may enact legislation affecting interstate commerce if the law passed does not "impede substantially the free flow of commerce from State to State." Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). An exercise of State police power by the enactment of legislation by the State for a proper objective is constitutionally permissible. In Stephenson v. Binford, 287 U.S. 251, 276 (1932), the Supreme Court stated: "We need not consider whether the [State] act [regulating carriage by truck] in some other aspect would be good or bad. It is enough to support its validity that, plainly, one

12 Cf. Mackay Radio & Telegraph Co. v. F.C.C., 97 F.2d 641, 643 (D.C. Cir. 1938).

of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid." Cf. Sproles v. Binford, 286 U.S. 374 (1932). One of the admitted purposes of the legislation with which we are here concerned was the preservation of State highways and another was the raising of State revenues. It appears clearly that the States involved in the instant case acted within their constitutional power, just as Governor Fine acted within his constitutional power when as Chief Executive of Pennsylvania he vetoed Senate Bill No. 615.[13] To hold otherwise would be to nullify substantially State legislative power.

It is asserted that United States v. Sisal Sales Corp., 274 U.S. 268 (1927), and Steele v. Bulova Watch Co., 344 U.S. 280 (1952), in effect overruled the American Banana Co. decision. In the Steele case the action was one brought under the Lanham Trade-Mark Act of 1946, 15 U.S.C.A. § 1051 *et seq.*, and was not based on the antitrust laws but more importantly an act of a sovereign was not involved. In the Sisal case it was held that the Sherman Act did not apply to what the defendants did in Mexico and Yucatan: *i.e.*, procure discriminatory legislation there. Mr. Justice McReynolds stated, 274 U.S. at p. 276, "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our Courts, and may be punished for offenses against our laws." The American Banana Co. decision expressly was not overruled. I can find no Supreme Court decision, unless it be Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), note 13, *supra*, which

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13 Cf. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), wherein the Supreme Court, granting a temporary injunction, held that the purpose of the State act procured by private activity, allegedly to conserve hulls and heads of unprocessed shrimp, was a feigned purpose and therefore was not a valid exercise of State police power.

indicates a holding contrary to that of the American Banana Co. decision. The Foster Fountain Packing Co. case seems distinguishable on the ground appearing in the note cited. But in any event in United States v. Rock Royal Co-Op., 307 U.S. 533, 560 (1939), the defendants attempted to prevent enforcement of a minimum Price Order [14] made by the Secretary of Agriculture on the ground that their competitors had engaged in a conspiracy to monopolize in violation of the Sherman Act by securing the drafting, adoption, and acceptance of the order. Mr. Justice Reed stated: "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

The facts in Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., 214 F.2d 413, 418 (5 Cir. 1954), present an interesting analogy to those at bar and are very similar, save only that legislative action was not involved. It was alleged, however, that the State Road Department of Florida acting as a result of a conspiracy in violation of the Sherman Act between Florida Power and Light Company and others, prevented the Okefenokee Rural Electric Membership Corporation from making use of the only feasible route for an electric line along a public highway. It was alleged in the complaint that the defendants had been guilty of a "smear campaign", had made false arguments and had conducted dishonest activities as a result of which the State Road Department refused to grant the permit for the power line. Treating the facts alleged in the complaint as true, the Court of Appeals, in dismissing the suit, stated: "As so forcibly illustrated in Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 163, 'Injury implies violation of a legal right.' The plaintiff had no legal right

14 Order No. 27, under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.

to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, notwithstanding it may have been irreparably damaged." Implicit in this ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency however inspired by the acts of individuals.

I conclude (1) that the Sherman Act was not intended by Congress to be applicable to governmental restraints by way of legislation whether or not induced by private activity and (2) that private activities such as those conducted by the Railroads and Byoir under the circumstances presented here cannot be deemed to constitute unreasonable restraints or monopoly under the Act.[15]

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15 Parenthetically, the court below reached, to me at least, the unusual result that the counterclaims asserted by the Railroads against the Truckers could not be maintained though the counterclaims allege acts of substantially the same character and nature as those of the Railroads and Byoir upon which judgment here is based. It is true that the Railroads conceded that the counterclaims are without merit. This concession was, I think, a necessary one. My view is based on the conclusion expressed in this opinion that the Truckers have not proved a cause of action under the Sherman Act. But the court below held that the Truckers' attempts at favorable legislation were permissible because they were attempting to procure laws that would better their competitive positions in relation to the Railroads. The court explains that the legislation sought would have permitted the Truckers to enter fields previously closed to them and that therefore no violation of the antitrust laws was involved. But business gained by interstate truckers of necessity would be at the expense of interstate railroads. Moreover the position of the court below in respect to the counterclaims not stating a valid and proved cause of action overlooks the "good will theory" advanced by the court itself as the basis for its judgment. That there were attacks made by the Truckers on the good will of the Railroads is indubitable and the court below so found. See 155 F. Supp. at p. 803. The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison.

*The Constitutional Issue.*

If the reasoning of this opinion as expressed thus far be erroneous, it is necessary to discuss the constitutional questions which are posed by the circumstances and the decision at bar. As I read the opinion of the court below the constitutional protection asserted by the defendants was rejected on the ground that by resorting to a campaign of defamation the Railroads and Byoir invalidated the guarantees of the First Amendment.[16] The majority opinion seems to take a similar view. But I had not hitherto imagined that a constitutional guarantee could be avoided because of the bad conduct of the individual asserting the constitutional right. I do not believe so now. It might be argued, of course, that a determination that a restraint is unreasonable obviates constitutional guarantees but to state this argument demonstrates its invalidty. Cf. United States v. Columbia Steel Co., *supra*, 334 U.S. at p. 522. The vast importance of the right to petition, usually exercised by joint action, was set out by Mr. Justice Brandeis in his dissenting opinion in Gilbert v. Minnesota, 254 U.S. 325, 337-338 (1920), as follows: "The right [to petition] . . . necessarily includes the right . . . to endeavor to make [one's] . . . own opinion concerning laws existing or contemplated prevail. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." Mr. Justice Brandeis' view in the Gilbert case became the law in Dennis v. United States, 341 U.S. 494 (1951). The First Amendment protects "secular" causes as well as "religious or political ones". Thomas v. Collins, 323 U.S. 516, 530-531 (1945). A proposal to tax trucks

16 See 155 F. Supp. at pp. 826-829.

stands upon the same ground as a religious speech or an unpopular political idea. The expression of "bloc sentiment" is an integral part of our legislative process. United States v. C.I.O., 335 U.S. 106, 143-144 (1948). There can be no question that the "idea" that trucks should or should not be taxed by the States has "social importance". Roth v. United States, 354 U.S. 476, 484 (1957).

If persons are to be prohibited access to legislators because their utterances may be offensive to personal taste or morals we have moved far away from the Framers' conception of our republican form of government. The concept of lack of access by the people to a legislature is in its essence totalitarian. If material contrary to good morals, such as obscene matter, is placed by an individual or a group in unenlightened self interest before a State legislature it is, of course, permissible for the State to punish the projectors of such material by criminal or civil sanctions. But the imposition of such sanctions assuredly is not the function of the antitrust laws of the United States. To say that an individual legislator may be over-persuaded or wrongly convinced as to how he should vote is to state a commonplace but to deprive an individual of the right to petition under the guise of protecting private companies from restraint of trade or monopolistic practices is to say far too much and to say it badly. To whom may a person go to attempt to create or change the laws under which he lives if not to his Senators or Representatives, State or National? True, ills may inhere in this democratic process. The legislature may be propagandized by material from a tainted source but this is an abuse which is curable as Congress has cured it.[17] If

17 It should be observed that the court below effected legislation for it requires the Railroads and Byoir not to publicize material relating to the Truckers "without disclosing their [own] participation": See paragraph "IV-(6)" of the final decree. I would conclude that this alone would require modification of the form of the injunction entered by the court below and approved by this court. Cf. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), in which the Supreme Court interdicted the prohibition of "privacy in group association".

persons are to be deprived of the right to petition because that right has been subject to abuse, liberty visibly will take flight.

I think that every thoughtful person will agree that the legislative processes cannot be conducted successfully and should not be conducted at all unless members of the public and all interested groups are allowed free access to legislators and legislatures in respect to legislation pending or proposed. The application of the Sherman Act to limit the free expression of ideas by the public and interested groups, the right to petition, in order to give information, whether pertinent or impertinent, to their legislators and legislatures, would foil the legislative processes which consist in a large part of the balancing of conflicting interests and influences. In this field limitation is the equivalent of prohibition for if persons exercising their right to petition are to be subject to prosecution under the Sherman Act or to damages in civil suits under the Clayton Act, or go in fear of such prosecution or such suits, these persons will not exercise the right to petition and a fundamental constitutional right will be limited or destroyed. Sources of information now open to legislators as to pertinent conflicting interests will be choked off or obliterated. The scope of the Sherman Act has been greatly enlarged in recent years and it is indeed a flexible statute but I cannot conceive that Congress intended it to be applied to limit or prohibit free access to legislatures or to the inducing of legislative action by private activity.

Moreover, in the instant case the exercise of State police or taxing power is a most delicate area in the fine balance which must be preserved between the States and the National Government. The enactment of legislation in the two fields designated is peculiarly a concern of the States and the enactment of such laws by the legislatures is the last sanctuary of States' rights. Here another provision of the Constitution comes into play. The Tenth Amendment provides that: "The powers not delegated to the United States

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." True, State police power has been curbed in the past by Congress by way of the Civil Rights Acts and State taxation has been limited by Congress where it has been deemed to trench on interstate commerce. And see again the quotation from Mr. Chief Justice Stone's opinion in Parker v. Brown, *supra*, 317 U.S. at p. 351, where California had passed a proration statute which restricted competition among growers of raisins and also fixed prices. The principle enunciated is central to the Tenth Amendment for one must always ask oneself, as indicated above, how a State legislature could legislate effectively without information or petitions from those affected by legislation? The argument made by the Truckers in substance is that State action is not being affected but only nefarious conduct by those who induced State action is being curbed. It would seem that action by the State under the circumstances at bar must surely cauterize action by individuals. But if the great liberties guaranteed by the Constitution must be exercised reasonably, surely the circumstances presented here do not warrant limitation of the right to petition by the Sherman Act. I believe that Congress did not intend or even contemplate such a result.

### *As to Damages.*

The court below, as I grasp the contents of its opinion, has concluded that because the Railroads and Byoir embarked on a "Campaign of Vilification" against the Truckers legal damage resulted to them in the form of loss of "good will".[18] The court divided "good will" into two categories: first, good will of the Truckers in respect to

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18 The court below stated: ". . . [A] real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." 155 F. Supp. at p. 810 ("Summary").

their customers, injury by way of loss of business, and, second, loss of the good will of the public, the injury being defined in terms of disability "to avoid the imposition of crippling burdens and restrictions".[19] By stipulation it was agreed by the parties that the only damages claimed by the Truckers were those resulting from gubernatorial veto of certain legislation.[20] Single damages, subsequently trebled were awarded to PMTA. These were assessed on the basis principally of the money, $217,358, spent by PMTA, through Allied Public Relations Associates, for "defensive measures", measures employed by PMTA to aid the Truckers, including the prosecution of the suit at bar. The monies which PMTA spent were expended for the very purposes

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19 The court stated: "[T]he use of the term 'good will' . . . relates not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but refers also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." 155 F. Supp. at pp. 810-811 ("Summary").

20 Section 3 of the Stipulation is as follows: "The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."

The court took the position that the section of the stipulation quoted limited the money value of the Truckers' claims but not the nature of their claims. This was an erroneous interpretation of the stipulation. The Truckers called to testify conceded that their respective businesses had been harmed only by the legislative action or inaction that the Railroads and Byoir had effected. At pre-trial conference it was stipulated that the Truckers who had not testified as to this issue would give similar evidence. Following this agreement the stipulation set out in Section 3, *supra*, was entered into. The distinction made by the court between the nature of the damage and the scope of the damage money-wise is invalid and also does violence to the intent of the parties.

for which they were contributed by the Truckers to PMTA.[21] It appears therefore that these expenditures made by PMTA were in reality paid for by the Truckers and that PMTA was a mere agent or conduit for the sums expended. I therefore can perceive no basis for the reimbursement of these sums to PMTA by way of allowance of damages to PMTA.

Moreover, the court below, while expressly refusing to allow damages to the Truckers because of the successful efforts of the Railroads and Byoir in defeating legislation sought by the Truckers, nonetheless allowed each of the Truckers nominal damages of six cents, trebled, eighteen cents, because of the Railroads' and Byoir's bad conduct. Since the court below held that no legally cognizable damages could ensue from acts entirely governmental [22] no legal foundation to support these nominal awards appears.

A substantial counsel fee was also allowed to counsel for the PMTA. This award also must fall if the judgment is reversed as I believe it must be.

I am also of the opinion that the injunctive relief granted under Section 16 of the Clayton Act is without justification. My conclusion in this regard is not based on any alleged abuse of legal discretion by the court below. It rests on the broad ground that no facts were proved which, under the antitrust laws, could justify the injunctive relief granted.

In conclusion, on the issue of damages, it is desirable, although perhaps not necessary, to comment briefly on the approach of the court below to loss of "good will" as ele-

21 See opinion on damages. 166 F. Supp. at pp. 166-168. As has been indicated PMTA is a Truckers' service organization. There is nothing in the record which would support its right to maintain a class suit, real or "spurious", on behalf of the Truckers. No satisfactory theory appears under which PMTA can be held to be entitled to maintain a suit in a representative capacity. See Rule 23, Fed. R. Civ. Proc., 28 U.S.C. Cf. United States v. Association of American Railroads, 4 F.R.D. 516 (N.D. Neb. 1945).

22 See 155 F. Supp. at pp. 834-835.

ments of damage. If damages are to be recovered under Section 1 (or for that matter, under Section 2) of the Sherman Act in conjunction with Section 4 of the Clayton Act, there must be proof of damage. As to the loss of good will by the Truckers, business-wise in respect to their customers as defined by the court below, quoted in note 19 *supra*, it is clear there was no showing of any loss of business by any individual Trucker. None of the Truckers had or could have a legally protected interest in the good will of the trucking industry as a whole. Cognizable injury under the Sherman Act must be to some "business or property", *i.e.*, a violation of some property right or business which is recognized by the law.[23] The court below took the position that the trucking industry is a legal entity possessing a cognizable interest in a kind of general good will belonging jointly to all Truckers in the suing group. But the suit at bar is a private antitrust suit. No joint right whatsoever is involved and each Trucker must maintain and vindicate his own separate and individual right.[24] There can be no good will in gross. There is no evidence that any of the Truckers individually suffered or was threatened with any injury to his good name or to his business reputation. This element of damage attempted to be proved by the Truckers was shown to be completely lacking in factual foundation.

For the reasons stated I must dissent. I would reverse the judgment of the court below save only as to that portion of it which denies relief under the counterclaims.

---

23 See Harrison v. Paramount Pictures, 115 F. Supp. 312, 316, 317 (E.D. Pa. 1953), aff'd *per curiam* on the opinion below, 211 F.2d 405, (3 Cir. 1954); Melrose Realty Co. v. Loew's Inc., 234 F.2d 518 (3 Cir. 1956), cert. denied, 352 U.S. 890 (1956).

24 See Hess v. Anderson Clayton & Co., 20 F.R.D. 466 (S.D. Cal. 1957) Weeks v. Bareco Oil Co., 125 F.2d 84 (7 Cir. 1941); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7 Cir. 1952); Bascom Launder Corp. v. Telecoin Corp., 9 F.R.D. 677 (S.D.N.Y. 1950); and Farmers Co-op Oil Co. v. Socony Vacuum Oil Co., 133 F.2d 101 (8 Cir. 1942).

## APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,750 and 12,751

NOERR MOTOR FREIGHT, INC., ET AL.,
*Appellants in 12,750,*

*v.*

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.,
*Appellants in 12,751.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge,* and MCLAUGHLIN and STALEY, *Circuit Judges.*

### JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of July 22, 1958 and the order of July 31, 1958 in this cause be, and they are hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF
*Clerk*

December 10, 1959

## APPENDIX C.

### THE CONSTITUTION AND STATUTES INVOLVED.

1. The First Amendment of the Constitution of the United States, which provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, which provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *"

3. Section 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 2, which provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with the foreign nations shall be deemed guilty of a misdemeanor * * *"

4. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, which provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee * * *"

5. Section 16 of the Clayton Act, 38 Stat. 737, 15 U.S.C. § 26, which provides in pertinent part as follows:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *"

## APPENDIX D.

Petitioners are:

Eastern Railroad Presidents Conference
Pennsylvania Railroad Company
New York Central Railroad Company
Chesapeake & Ohio Railway Company
Norfolk & Western Railway Company
Baltimore & Ohio Railroad Company
Reading Company
New York, New Haven & Hartford Railroad Co.
Lehigh Valley Railroad Company
Lehigh & New England Railroad Company
Delaware, Lackawanna & Western Railroad Co.
Delaware & Hudson Railroad
Erie Railroad Company
Western Maryland Railway
Pittsburgh & West Virginia Railway
New York, Chicago & St. Louis Railroad Co.
Boston & Maine Railroad
Central Railroad Company of New Jersey
Central Railroad Company of Pennsylvania
Maine Central Railroad Company
Lehigh & Hudson River Railroad
Union Railroad Company (Pittsburgh)
Canadian Pacific Railway Company
Canadian National Railways
Carl Byoir & Associates, Inc.

Respondents are:

Noerr Motor Freight, Inc.
Kramer Bros. Freight Lines, Inc.
McLean Trucking Company
Lansdale Transportation Co., Inc.

T. M. Zimmerman Company
W. I. Womeldorf & Sons Company
Rodgers Motor Lines, Inc.
Akers Motor Lines, Inc.
Keystone Lawrence Transfer & Storage Company
W. J. McCormick Truck Transportation
Martin Brothers
Pennsylvania Transfer Company
F. W. Lusk Transfer Company
Davidson Transfer & Storage Company
Suwak Trucking Company
C. W. Dillie
A. W. Bauman, Jr. Trucking Company
Martsolf Bros.
Spector Motor Service, Inc.
G. C. Braden Trucking Company
Edward G. Horn Trucking Co.
Seaboard Tank Lines, Inc.
Friedman's Express, Inc.
Karn's Transfer, Inc.
Lombard Bros. Incorporated
Lester C. Newton Trucking Company
Pennsylvania Motor Truck Association
D. F. Bast
Ed. Chadderton Trucking
Cooper-Jarrett, Inc.
Eastern Freight-Ways, Inc.
Fowler & Williams, Inc.
William F. Crossett, Inc.
Fischbach Trucking Co.
Hall's Motor Transit Co.
Mushroom Transportation Co., Inc.
Miller Motor Express, Inc.
Yale Transport Corporation
Daily Motor Express
McCullough Transfer Co.
York Trahsportation Co.

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JAMES R. ... Clerk

IN THE

# Supreme Court of the United States

October Term, 1959.

No. ~~750~~ 50

NOERR MOTOR FREIGHT, INC., et al.,
*Respondents,*

*v.*

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
*Petitioners.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 758.

NOERR MOTOR FREIGHT, INC., ET AL.,
*Respondents,*

*v.*

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.
*Petitioners.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

### QUESTIONS PRESENTED.

1. Where the District Court found as a fact that petitioners combined and conspired with the specific intent of destroying respondent trucking companies as competitors in the long-haul freight business, in order to monopolize that business for themselves, and the Court of Appeals sustained that finding as soundly based on substantial evidence, are petitioners exonerated from liability under the Sherman Act because the means they employed to achieve their illegal objective included, among other activities, a public relations campaign against respondents (in which petitioners' role was concealed and disguised), to influence governmental action against respondents?

2. Was respondent association (PMTA) properly awarded damages, where petitioners raised no objection in the District Court to its standing to recover such damages, and the damages awarded were for the loss to the association itself caused directly by the conspiracy?

## STATUTES INVOLVED

Respondents agree with Petitioners' citation of the statutes involved, but deny that any question arises under the First Amendment of the Constitution of the United States.

## STATEMENT OF THE CASE.

The District Court found as facts,[1] which findings were affirmed as "soundly based on substantial evidence" by the Court of Appeals,[2] that:

"7. The acts of the various defendants referred to in these Findings of Fact and Conclusions of Law and of those persons employed or engaged by them, were done and performed pursuant to the conspiracy and with the intent and for the purposes and objectives referred to below in Findings of Fact Nos. 12 and 14,

. . .

"12. On or about May 19, 1949, defendants other than Byoir, acting through ERPC, combined and conspired with the intent and for the purpose and objective of eliminating truck operators, including plaintiff truck-

1. In a 74 page opinion. 155 F. Supp. 768 to 841, exhaustively analysing a trial record consisting of more than 6,000 pages and 968 exhibits. See 155 F. Supp. 808.

2. Under the practice of the third circuit the opinions of the court are circulated among all members of the court, including those not on the panel hearing the case. Rehearing is ordered when a majority of the court so votes. *United States v. United Steelworkers of America*, 271 F. 2d 676, 694 (3d Cir. 1959). It would appear from the Per Curiam opinion that a majority of the court did not favor rehearing here.

ing companies, from the long-haul transportation of freight in interstate commerce in the eastern territory and monopolizing that portion of interstate transportation and commerce for defendant railroads.

"14. Defendant Byoir joined the said combination and conspiracy with the intent and for the purpose and objective referred to in Finding of Fact No. 12, on or about August 15, 1949, when it was retained by ERPC as its public relations agency." (Appellants' Appendix in No. 12,750, pages 36a-37a, 181a. See also 106a-107a, 126a.)

See also the findings in Section III of the Final Decree filed July 22, 1958.[3]

The District Court also found that: "56. Plaintiff PMTA was injured by reason of the substantial expenditures which it made to defend itself and its members against defendants' conspiracy". (Appellants' Appendix in No. 12,750, page 46a, 181a.)

---

3. Accompanied by a further opinion, 166 F. Supp. 163, 171-2. The Supreme Court does not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271 (1949).

## ARGUMENT.

Petitioners contend, in support of their request for certiorari, that the decision and injunction below are "remarkable" and "unprecedented", and that "this is not just another routine antitrust case" (Petition 4, 8, 9). Actually, there is nothing either remarkable or unprecedented about it. This type of antitrust case has become routine, as the citations below indicate. Petitioners' posture of surprise may be due in some part to their having overlooked the basic findings of fact as to the purpose of their conspiracy, which they ignore in the petition, as they did in the Court of Appeals.

In commenting on the injunction, petitioners again ignore the fact that the various subparagraphs of the injunction about which they complain apply, pursuant to Section IV (A), only to acts done in conspiracy and for the purpose of restraining competition. The dissemination of information is expressly not affected except where the connection of petitioners with the dissemination is concealed and they act in conspiracy for the purpose prohibited by the Sherman Act (Sec. IV (A) 65). Opposition to legislation, even where undertaken pursuant to the conspiracy, is expressly affected only where petitioners conceal their role in such opposition. Sec. IV (A) (9). The injunction provides that nothing contained therein is to be construed to prohibit petitioners from seeking legislative or other governmental benefits for themselves, nor from appearing before any governmental body to point out the effect upon them of the enactment of any legislative or administrative ruling which may be designed to aid respondents (Sec. V).

It has repeatedly been held that combinations in restraint of trade or to monopolize are not exempted from the scope of the antitrust laws merely because some or all of the means used by the conspirators involve contacts with legislative or other governmental agencies which would otherwise be privileged or even constitutionally protected

in the absence of the illegal purpose. *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927) (legislation); *Slick Airways, Inc. v. American Air Lines*, 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed 204 F. 2d 230 (3d Cir. 1953), cert. denied 346 U. S. 806 (1953) (courts and administrative board); *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), aff'd 355 U. S. 5 (1957) (courts); *Forgett v. Scharf*, 181 F. 2d 754 3d Cir. 1950) (courts); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 424-5 (10th Cir. 1952) (courts).

See also *Crummer v. DuPont*, 223 F. 2d 238, 248 (5th Cir. 1955) and 255 F. 2d 425 (5th Cir. 1958), cert. denied 358 U. S. 884 (1958);[4] *Atchison, Topeka & Santa Fe Rwy. v. Aircoach Transport Ass'n*, 253 F. 2d 877 (Ct. of App. D. C. 1958); *Riss & Co., Inc. v. Association of Western Rwys.*, 159 F. Supp. 288 (D. D. C. 1958); *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Parmelee Transportation Company v. Keeshin*, 144 F. Supp. 480, 484 (N. D. Ill. 1956).

And as said in *Parker v. Brown*, 317 U. S. 341, 351 (1943): "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," quoted in *Asheville Tobacco Board of Trade, Inc. v. F. T. C.*, 263 F. 2d 502, 508 (4th Cir. 1959). The same principle is illustrated in another context by *United States v. Silliman*, 167 F. 2d 607, 612 (3d Cir. 1948), cert. denied 335 U. S. 825 (1948).

Nor are such combinations exempt because the means which they employ consist of the dissemination of information. *Giboney v. Empire Storage & Ice Co.*, 335 U. S. 490 (1949). "The Sherman Act forbids combinations of traders to suppress competition," *United States v. Parke, Davis*

4. In its petition for certiorari, which was denied, the petitioner in the *Crummer* case made exactly the same arguments and cited substantially the same authorities as are advanced by petitioners here, including reference to Judge Clary's opinion in this very case. The parallel is so striking that the relevant section of the petition in that case is set forth in an Appendix hereto.

*and Company*, 28 U. S. L. Wk. 4150, 4154 (U. S. Feb. 29, 1960), and this is true regardless of whether the means would be legal or protected in the absence of the illegal purpose. *American Tobacco Company v. United States*, 328 U. S. 781, 809 (1946).

Furthermore, even if a propaganda barrage were otherwise exempt from the antitrust laws, such a privilege would be forfeited here where petitioners acted through front organizations, concealing their participation in these activities by what they euphemistically term "the third-party technique". Such concealment, particularly where employed to influence governmental action, has been held time and again to be illegal or against public policy. *Marshall v. The B. & O. R. R. Co.*, 16 Howard (57 U. S.) 314 (1853); *Angle v. Chicago, St. P. Minn. & O. Ry. Co.*, 151 U. S. 1 (1893); *Commissioner v. Textile Mills Sec. Corp.*, 117 F. 2d 62 (3d Cir. 1940), aff'd 314 U. S. 326 (1941); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 247 (1944); *United States v. Harriss*, 347 U. S. 612 (1954).

This situation is completely different from that presented to the Court in the recent cases of *Bates v. City of Little Rock*, 4 L. Ed. 2d 480 (1960) and *Talley v. California*, 28 U. S. L. Week 4186 (U. S. Mar. 7, 1960), where the NAACP and NATIONAL CONSUMERS MOBILIZATION were held to be protected by the Constitution in not revealing their members because of well-grounded fears of intimidation. Petitioners here, on the contrary, are among the most powerful corporations in the United States, who are in no danger of intimidation in the proper exercise of their constitutional rights if their identity is revealed. And in the *Bates* and *Talley* cases, the role of the NAACP itself and the other Negro organization was not concealed. Here the petitioners even concealed the fact that the railroad industry or railroad interest were disseminating the material, and affirmatively and artfully disguised the source by having it issued in the name of the Grange and other farm organiza-

tions, women's clubs, citizens' groups, college professors and governmental agencies. Public relations activities of this type are not exempt from the operation of the antitrust laws, and indeed the activities of the very defendant here, Byoir, were found to be an integral part of the A. & P. conspiracy in *United States v. New York Great A. & P. Tea Co.*, 173 F. 2d 79, 80, 90 (7th Cir. 1949).

Hence the usual rule is applicable that: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an intergral part of conduct in violation of a valid criminal statute. We reject the contention now." *Giboney v. Empire Storage & Ice Co.*, 335 U. S. 490, 498 (1949).

Petitioners, moreover, did not confine themselves simply to procuring legislation. They engaged also, pursuant to their conspiracy to monopolize the long-haul freight business, in a "third-party" campaign to alienate respondents' customers (Appellants' Appendix in No. 12,750, page 121a).

Finally, with regard to the standing of respondent association to recover damages, this issue was never even raised by petitioners in the District Court and is, therefore, waived. F. R. C. P. 12(h). Nor was it seriously pressed in the Court of Appeals. Respondents would be prejudiced if this contention were considered now, because they would not have entered into the stipulation which limited the individual respondents to nominal damages, if the defense had been claimed in the District Court. This issue, on the merits, was properly decided, because the Association was awarded judgment for damages accruing directly to it. See *American Cooperative Serum Association v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), cert. denied 329 U. S. 721 (1946).

## CONCLUSION.

Petitioners have not challenged the District Court's fundamental findings of fact, and the Court of Appeals has held them to be soundly based on substantial evidence. Under those findings, petitioners cannot deny here that they combined and conspired for the unlawful purpose of eliminating respondent trucking companies as competitors in the long-distance hauling of freight, and that a violation of the Sherman Act has been established. The District Court's findings, affirmed by the Court of Appeals, similarly establish respondents' right to the relief granted.

For the reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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## RESPONDENTS' APPENDIX.

**Excerpt From Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in DuPont v. The Crummer Company, in the Supreme Court of the United States, October Term, 1958, No. 366 (printed pages 13-15), Denied, 358 U. S. 884 (1958).**

A substantial and increasing number of cases under the antitrust laws have raised in a variety of forms the question of the extent to which liability may be based upon the consequences of government action instigated or encouraged by the defendants against the plaintiffs before federal regulatory agencies or other government bodies. See, for example, *S. S. W., Inc. v. Air Transport Ass'n of America*, 191 F. 2d 658, 660 (D. C. Cir. 1951); *Okefenokee Rural Electric Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954); *Slick Airways v. American Airlines*, 107 F. Supp. 199, 213-214 (D. N. J. 1951), appeal dismissed 204 F. 2d 230 (3d Cir. 1953), cert. denied 346 U. S. 806; *United States v. Association of American Railroads*, 4 F. R. D. 510, 527 (D. Neb. 1945); *Noerr Motor Freight v. Eastern Railroad Pres. Conference*, 113 F. Supp. 737, 742 (E. D. Pa. 1953) and 155 F. Supp. 768 (E. D. Pa. 1957); *United States v. Morgan*, 118 F. Supp. 621, 822 (S. D. N. Y. 1953); *Riss & Co. v. Ass'n of Western Railways*, 159 F. Supp. 288, 289 (D. D. C. 1958); *Boston & Maine R. R. v. United States*, 162 F. Supp. 289, 300 (D. Mass. 1958).

These cases all make potential defendants of the members of any group which seeks government assistance for itself to the possible damage of others. The acts claimed in these cases to provide the basis for liability range from support of particular legislation to intervention before administrative agencies, and in some instances include the submission of information to law enforcement agencies with respect to possible violations of law. The decision below

raised the same fundamental questions presented by these cases and does so in an aggravated form because it imposes potential liability for an indefinite period of time upon the members of any group which directs the attention of a law enforcement agency to possible violations of law by others. If the decision is permitted to stand without review by this Court, its inevitable effect will be to discourage the submission of information to enforcement agencies, including necessarily even those—such as the Department of Justice and the Federal Trade Commission—which are themselves charged with enforcement of the antitrust laws.

The court below erred in holding that the act of supplying information to a government agency concerning possible violations of a federal statute can serve as a predicate for liability under the antitrust laws even if the act is assumed to have been performed pursuant to a conspiracy. The antitrust laws are directed at private combinations and conspiracies in restraint of trade and are designed to protect the public against the consequences that follow from these private activities. *Apex Hosiery Co. v. Leader*, 310 U. S. 469. The laws were not intended to regulate the relations between citizens and governmental agencies and cannot apply to consequences which are the result of governmental action. *Parker v. Brown*, 317 U. S. 341, 352; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; see also *Steele v. Bulova Watch Co.*, 344 U. S. 280, 288. To extend those laws, as the court below did, into the area of governmental activity would impose upon the relations between the government and its citizens standards which were intended for other purposes, and which are foreign and inimical to the rights of citizens to petition their government, to exercise free access to the courts, to appear before administrative agencies, and to submit information to law enforcement officials. The serious nature of the disruption of orderly government which can ensue from such an extension of the antitrust laws is evidenced in the present case.

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IN THE

# Supreme Court of the United States

October Term, 1960.

## No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals
For the Third Circuit.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.,

*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

## BRIEF FOR THE PETITIONERS.

### OPINIONS BELOW.

The *per curiam* opinion of Circuit Judges McLaughlin and Staley (R. 214) and the dissenting opinion of Chief Judge Biggs (R. 219) of the United States Court of Appeals for the Third Circuit are reported at 273 F. 2d 218. The opinions of the United States District Court for the Eastern District of Pennsylvania (R. 37 and 345b) are reported at 155 F. Supp. 768 and 166 F. Supp. 163.

### JURISDICTION.

The judgment of the Court of Appeals was entered on December 10, 1959 (R. 236). The petition for a writ of certiorari was filed March 3, 1960, and was granted April 18, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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## QUESTIONS PRESENTED.

1. Whether the courts below correctly held that petitioners violated the Sherman Act by engaging in a public relations campaign that sought public support for or opposition to state legislation affecting the competitive position of respondents' industry and that, according to the courts below, sought to injure "the good will of the long-haul trucking industry".

2. Whether under the Sherman Act an injunction may be issued which, among other things, enjoins a group of railroads and their officers and employees (1) from sponsoring, instigating, or supporting the enactment of legislation imposing weight, size, or other limitations on trucks or levying taxes of any kind on long-haul truckers, (2) from engaging in public discussion of issues of public interest which may be found "to create resentment or hostility" to long-haul truckers "in the minds of the general public" or "in the minds of legislators, law enforcement officers, or other public officials, or members of any branch of government", and (3) from publishing "derogatory material" relating to long-haul truckers.

3. Whether a member of the trucking industry or a trade association of the trucking industry is "injured" in its individual "business or property", as those terms are used in the antitrust laws, by publicity concerning matters of public importance relating to that industry as a whole when the publicity did not refer to any particular member or its individual business relationships and, legislation aside, there was no evidence of loss to the business of any member as a result of the publicity.

## STATUTES INVOLVED.

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2, sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, and the First Amendment of the Constitution of the United States are set forth in the Appendix to this brief, page 53.

## STATEMENT OF THE CASE.

Petitioners, twenty-three eastern railroads, an association of their presidents (Eastern Railroad Presidents Conference, "ERPC"), and a public relations firm (Carl Byoir & Associates, "Byoir") were sued under the Sherman Act by some forty long-haul trucking companies and a trade association (Pennsylvania Motor Truck Association, "PMTA"). The complaint, filed in January 1953, alleged that the petitioners had combined and conspired to restrain and to monopolize the transportation of freight in violation of Sections 1 and 2 of the statute. A jury trial having been waived by all parties, the issues of law and fact were decided by the District Court. The proof adduced at the trial predicated liability upon the activities of the petitioners in disseminating statements which sought to convince the public and, through the public, the legislatures of the several states that state taxes on long-haul trucks should be increased and that maximum weight limitations on trucks should be lowered or, in any event, maintained and enforced.

The judgment affirmed by the Court of Appeals awarded nominal damages (6 cents trebled) to each of the individual trucking companies and gave substantial money damages to PMTA based on expenses which it had incurred in its own publicity campaign in support of its legislative program adverse to the interests of the railroads. The judgment also contained sweeping injunctive provisions which, among other things, enjoined the petitioners from jointly supporting legislation which would impose taxes of any kind upon long-haul truckers or limit the size and weight of their trucks, and from jointly engaging in any public discussion which is "derogatory of" the truckers, or which might create "resentment or hostility" toward them in the minds of the general public, shippers, or public officials.

## A. The Economic and Political Background of the Controversy.

Since the 1930's and throughout the period covered by the complaint the growth of the long-haul trucking industry, largely at the expense of the railroads, has been phenomenal by any standard. In the period following World War II there was an even greater contrast between the sharp decline of the railroads' business and the spectacular rise of the truckers'. (¶¶ 9-11[1], R. 263b; ¶ 10c, R. 297b; ¶¶ 15c, 17c, R. 299b; ¶ 20c, R. 300b.) By 1949 it had become clear to petitioners that this diversion of traffic had occurred because basic components in the cost of truck service were being controlled not by free economic forces but by what the state legislatures could be persuaded to grant or withhold.

In seeking to obtain legislation that would enable them to take business from the railroads, the truckers had banded together to conduct public relations campaigns which had largely achieved two goals: first, obtaining legislative permission to use ever-larger and ever-heavier trucks carrying greater payloads; and, second, preventing higher truck fees and taxes so that the cost of building and maintaining highways used by inter-city trucks would continue to be defrayed principally from general tax revenues rather than from funds provided by the truckers (R. 44-45; ¶ 30, R. 269b; ¶ 41c, R. 305b). In contrast, the railroads were obliged to continue, with their own funds, to provide and maintain their own tracks and rights of way.

Since the truckers' competitive cost advantage had been legislatively created it could be mitigated only by action of the legislatures. In this setting, petitioners decided to encourage public opposition to state legislation which would increase maximum allowable truck weights, public support for enforcement of existing state laws restricting truck weights, and public support for legislation increasing

1. References to "¶" are to Findings of Fact made by the District Court.

taxes on long-haul trucking operations and restricting the weight of trucks.

**B. The Nature of Petitioners' Activities.**

It was against this background that the railroad petitioners in 1949 retained Byoir to undertake a public relations program which would acquaint the public with the arguments in support of the railroads' point of view on these legislative issues. The basic arguments were:

(1) that heavy trucks damage existing highways and cause highway hazards and congestion; and

(2) that the trucking industry does not pay its fair share of the cost of maintaining and building roads to accommodate increasingly heavy vehicles.

In publicizing these arguments Byoir used methods frequently employed in public relations campaigns directed to legislation. In states where they were active petitioners sought out other persons and organizations who were willing to ally themselves with the railroads. For example, in opposing legislation in Pennsylvania that would increase truck weights, Byoir worked with groups of farmers, municipal officials, and motorists, who had been longstanding opponents of increased truck weights (¶ 35, R. 270b; ¶¶ 37, 39, R. 272b; R. 62b-83b, 125b).

Petitioners supplied information to such allied groups and individuals, assisted them in the preparation and distribution of press releases, speeches, pamphlets, and articles (see, e.g., ¶ 39, R. 272b; P-30 to P-33, R. 380b-385b; P-73, R. 441b; P-291, R. 522b; P-66 to P-71, R. 396b-440b, 550b-556b; P-80, R. 444b; P-83 to P-87, R. 448b-472b), and sometimes furnished other technical and financial help as well. Petitioners also assisted in the publicizing of official and unofficial studies dealing with the highway problem (see, e.g., P-39 to P-42, R. 386b-391b, 546b) and distributed to the newspapers photographic mats which focused attention on the highway problem (P-149 to P-153, R. 559b-561b). They paid for and publicized public opinion polls (P-94,

R. 478b) and retained a research organization to make a statistical study of the comparative tax rates of various industries, including the trucking and railroad industries, and to publicize the results of its study (P-105, R. 482b).

In many cases the publicity material disseminated did not disclose that it had been originated, prepared, and distributed by or on behalf of petitioners. In some instances the petitioners formed and sponsored organizations which disseminated information and arguments in support of petitioners' position with respect to taxes and weight restrictions on truck operations without disclosing petitioners' relationship to the organizations.

Many of the same practices were followed by respondents, who likewise employed the so-called "third-party technique" in the anti-railroad campaigns in which they were vigorously engaged throughout the period to which this litigation relates (see Chief Judge Biggs' dissenting opinion, R. 219-220; R. 91-92, 115; ¶¶ 83c-87c, 89c-94c, 96c-102c, 104c, 106c-126c, 142c-159c at R. 320b-331b and R. 335b-340b).

The publicity material disseminated by petitioners was not directed, by name or otherwise, at any individual trucker, and respondents made no attempt to prove that it contained statements of fact that were false.[2] It dealt only with the following subjects:

> (1) support for or opposition to specific legislative bills dealing with truck weights or taxes under consideration in various states;[3]

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2. At the trial respondents' attack on the publicity was essentially directed to the use of the so-called "third-party technique". When petitioners offered to prove that the facts were as they had stated, the trial court rejected their offer (R. 155-156).

All the publicity material in the preparation or dissemination of which petitioners might be said to have played any part whatever, with the exception of certain voluminous technical treatises and motion picture films (P-271, D-3, D-10, D-69, D-70 to D-73), has been reproduced in Volumes II and III of the transcript of record.

3. P-57, R. 549b; P-69, R. 553b; P-112, R. 485b; P-118, R. 487b; P-119, R. 488b; P-129, R. 557b; P-130, R. 558b; P-235, R. 510b; P-273, R. 513b; P-274, R. 514b; P-283, R. 516b; D-5, R. 596b; D-6, R. 601b; D-7, R. 525b; D-51, R. 669b; D-57, R. 530b.

(2) the relationship between highway maintenance and construction costs and the increased use of heavy trucks;[4]

(3) the need for and sources of highway funds and the apportionment of taxes among highway users, including the argument that heavy trucks do not pay their fair share of highway costs;[5]

(4) the effect of heavy trucks upon existing highways, the prevalence of and reasons for truck overloading, and the enforcement of truck-weight statutes;[6] and

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4. P-12, R. 537b; P-31, R. 381b; P-33, R. 384b; P-42, R. 546b; P-49, R-548b; P-66, R. 396b; P-67, R. 410b-439b; P-68, R. 550b; P-70, R. 556b; P-81, R. 446b; P-83, R. 448b; P-85, R. 452b; P-88, R. 473b; P-94, R. 478b; P-126, R. 489b; P-129, R. 557b; P-171, R. 564b; P-172, R. 566b; P-173, R. 573b; P-185, R. 579b; P-200, R. 582b; P-203, R. 587b; P-254, R. 594b; P-271; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-10; D-39, R. 613b; D-41, R. 623b; D-42, R. 628b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-47, R. 644b; D-48, R. 667b; D-55, R. 670b.

5. P-12, R. 537b; P-13, R. 545b; P-16G, R. 379b; P-31, R. 381b; P-33, R. 384b; P-39, R. 386b; P-40, R. 388b; P-41, R. 390b; P-42, R. 546b; P-49, R. 548b; P-64, R. 392b; P-66, R. 396b; P-67, R. 410b; P-68, R. 550b; P-69, R. 553b; P-70, R. 556b; P-71, R. 440b; P-73, R. 441b; P-79, R. 442b; P-80, R. 444b; P-81, R. 446b; P-83, R. 448b; P-84, R. 450b; P-85, R. 452b; P-86, R. 461b; P-87, R. 471b; P-88, R. 473b; P-89, R. 476b; P-94, R. 478b; P-103, R. 481b; P-105, R. 482b; P-112, R. 485b; P-118, R. 487b; P-171, R. 564b; P-172, R. 566b; P-173, R. 573b; P-185, R. 579b; P-194, R. 581b; P-200, R. 582b; P-203, R. 587b; P-250, R. 590b; P-254, R. 594b; P-271; P-273, R. 513b; P-274, R. 514b; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-3; D-10; D-42, R. 628b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-47, R. 644b; D-48, R. 667b; D-51, R. 669b; D-55, R. 670b; D-56, R. 671b; D-57, R. 530b; D-60, R. 672b; D-62, R. 531b; D-63, R. 533b.

6. P-12, R. 537b; P-30, R. 380b; P-31, R. 381b; P-33, R. 384b; P-49, R. 548b; P-57, R. 549b; P-66, R. 396b; P-67, R. 410b-439b; P-68, R. 550b; P-69, R. 553b; P-81, R. 446b; P-85, R. 452b; P-94, R. 478b; P-118, R. 487b; P-119, R. 488b; P-129, R. 557b; P-130, R. 558b; P-149, R. 559b; P-150, R. 559b; P-151, R. 560b; P-152, R. 560b; P-168, R. 507b; P-170, R. 562b; P-171, R. 564b; P-172,

(5) highway dangers and congestion contributed to by heavy trucks.[7]

In its discussion of petitioners' publicity material the District Court singled out a number of items for special comment, apparently because it regarded them as illustrative. These examples show, better than any general description or classification, the nature and content of petitioners' publicity material:

(a) A speech, and press releases concerning it, delivered before service and civic clubs in New Jersey, which discussed the damage inflicted on New Jersey highways by large out-of-state trucks, the cost of such damage not borne by those who caused it, and tax measures recommended to correct the situation (P-66, R. 396b, and P-67, R. 410b-439b discussed at R. 52).

(b) An article in a farm magazine (said by the trial court to have "skillfully developed all the major points in the ERPC campaign"—R. 63-64) that sought to dramatize the effect of heavy trucks on public highways and called upon the farmer who was interested in roads to "demand that [his] state legislature pass effective legislation for limiting the weight of the big trucks, for enforcing the limitations, and for making them pay taxes toward the upkeep of the roads based on the weight they carry and the distance they travel" (P-173, R. 573b at R. 574 discussed at R. 63-64).

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R. 566b; P-173, R. 573b; P-181, R. 575b; P-182, R. 577b; P-200, R. 582b; P-203, R. 587b; P-235, R. 510b; P-250, R. 590b; P-254, R. 594b; P-273, R. 513b; P-274, R. 514b; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-9, R. 526b; D-10; D-43, R. 629b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-48, R. 667b; D-51, R. 669b; D-55, R. 670b; D-56, R. 671b; D-57, R. 530b; D-62, R. 531b; D-63, R. 533b; D-69; D-70 to D-73.

7. P-66, R. 396b; P-67, R. 410b; P-129, R. 557b; P-130, R. 558b; P-153, R. 561b; P-170, R. 562b; P-171, R. 564b; P-172, R. 566b; P-181, R. 575b; P-182, R. 577b; P-254, R. 594b; P-273, R. 513b; D-8, R. 612b; D-40, R. 614b; D-46, R. 638b; D-51, R. 669b; D-56, R. 671b.

(c) A background research memorandum, which was furnished to the author of an article in *The Saturday Evening Post* that described the battle the Maryland state police were having with overloaded trucks (P-172, R. 566b discussed at R. 63).

(d) An article in *Country Gentleman*, which described the situation of the farmers who are handicapped by a lack of good all-weather roads and which discussed the sources of money for road improvement and encouraged farmers to seek additional aid for rural roads from their state legislatures (P-185, R. 579b). In describing a film based upon the article (P-271) the trial court found that "the lasting impact of the film is that big trucks do not pay their fair share of highway construction and maintenance" (R. 66; see also R. 64-65).

(e) Research material supplied to the late Senator Richard L. Neuberger for his article in *Harper's Magazine*, which dealt with problems of raising highway funds and of distributing highway costs among highway users, and which drew upon his own experience as an Oregon legislator in the adoption of a weight-distance tax on heavy trucks long before ERPC's retention of Byoir (D-44, R. 630b discussed at R. 66-67).

(f) Information, releases, and a film about a road test conducted by the Bureau of Public Roads under the direction of the Highway Research Board of the National Academy of Sciences (R. 67-76).

Other magazine articles, releases, resolutions, reports, letters, brochures, questionnaires, polls, and photographs were also the subject of comment in the District Court's opinion (R. 51, 54-57, 62-65, 85-87). All of them are included in the subject matter categories set forth at pages 6 to 8 above. All dealt with questions of highway safety, construction or finance.

None of this publicity suggested that the service to shippers provided by long-haul truckers was inadequate or unsatisfactory, that truckers' rates were unduly or unfairly high, or that it would be to the economic advantage of shippers to cease dealing with long-haul truckers. Nor was there any evidence that petitioners' publicity campaign caused any individual trucker, or the trucking industry as a whole, to lose customers.[8] Proof of injury to the truckers was confined to proof that certain of them would have made larger profits if the governor of Pennsylvania had not, in 1952, vetoed a bill, S. B. 615, which would have increased permissible truck weights.

### C. The Decisions Below.

The trial court held that this publicity campaign violated the Sherman Act, basing the holding upon its conclusion that petitioners' intent was to restrain and to monopolize long-haul freight transportation and upon the petitioners' use of the "third-party technique". The court held that this intent and the use of this technique rendered the campaign unlawful even if the sole objective of the campaign and its sole effect on respondents was the passage of state legislation adverse to respondents' interests and the defeat of state legislation which would have furthered respondents' interests.[9] Even though there was no evidence

8. On the contrary, the District Court found that the business of the truckers had increased sharply in the eastern United States between 1946 and 1954, whereas railroad freight traffic had actually declined in the same area during the same period (¶ 17c, R. 299b).

9. In the words of the District Court:

> ". . . even if their [petitioners'] activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws." (R. 127)

This misapprehension of the law was first voiced by the District Court in its opinion denying motions to dismiss the complaint. 113 F. Supp. 737, 742 (1953).

The like view of the majority of the Court of Appeals appears in its *per curiam* opinion at R. 217, in note 3.

of loss of business to the trucking industry generally or to any individual trucking company caused otherwise than by the veto of legislation sponsored by the trucking industry, the court nevertheless concluded that petitioners' activities were also intended to injure the "good will" of the trucking industry and that this objective was accomplished.

Each trucking company respondent had expressly stipulated that the only damages which it claimed were those resulting from the veto of Pennsylvania's Senate Bill 615 (R. 47b). Even though the District Court held that such damages are not legally compensable, it still awarded nominal damages to the trucker respondents. Further, it awarded to the trade association, PMTA, treble damages of $652,074 based, oddly enough, on expenses incurred by the association in conducting its own comparable public relations campaign, and a counsel fee. Finally, the court issued the injunction which is discussed in detail at pages 30 to 34 of this brief.[10]

Upon appeal by both sides,[11] Circuit Judges McLaughlin and Staley affirmed the decision of the District Court in a perfunctory *per curiam* opinion. Chief Judge Biggs, dissenting vigorously, described the result as "disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation" (R. 219).

10. The District Court also dismissed petitioners' counterclaim, which was based upon conduct of respondents similar to that which formed the basis of the respondents' complaint. See Chief Judge Biggs' dissenting opinion, R. 228, note 15.

11. The respondents appealed from the refusal of the District Court to award substantial damages to the individual trucking companies for the injury allegedly suffered because the governor of Pennsylvania vetoed legislation, S. B. 615, which would have increased the permissible gross weight of trucks.

## SUMMARY OF ARGUMENT.

### I.

The activity found by the courts below to have violated the Sherman Act was a public relations campaign. It did not involve any of the restrictive commercial practices to which the statute has traditionally been applied. Although there is dispute between the parties as to the purposes which motivated this campaign, there can be no dispute as to the content of the publicity which was disseminated. The content of this material consisted of the discussion of issues of public and legislative policy (truck weights, road damage, highway safety, cost and finance). It was not directed to the business relations between long-haul truckers and their customers and it had no capacity to interfere with those relationships.

The holding of the courts below that this campaign violated the Sherman Act in its legislative aspects and because those courts concluded that it also had extra-legislative purposes and effects is erroneous as a matter of law.

Restraints and monopolies imposed by valid governmental action are not within the reach of the Sherman Act. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; *Olsen v. Smith*, 195 U. S. 332, 344-345; *Parker v. Brown*, 317 U. S. 341, 351; *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560. Accordingly, concerted efforts to encourage the imposition of such restraints and monopolies cannot give rise to liability in damages, or provide a basis for injunctive relief, under that statute. That the courts below ignored this rule is strikingly disclosed by the terms of the injunction issued by the District Court and affirmed by the Court of Appeals, which is largely directed to forbidding legislative activity.

The error of the holding of the courts below cannot be cured by reliance upon their conclusion that petitioners'

campaign was motivated not only by legislative objectives but was simultaneously intended to injure the good will of the long-haul trucking industry and thereby interfere with business relations between truckers and shippers.

This conclusion cannot change the fact that what petitioners did was to disseminate arguments on issues of public policy. The Sherman Act has never been applied to this kind of public discussion of issues of general importance. The activities to which the Sherman Act has historically been applied by this Court have all been commercial practices which restrain the free play of competitive economic forces either by limitations self-imposed by those engaged in the practices or by the exercise of coercive power directed against the commercial freedom of third persons. The debate and discussion of issues of public policy engaged in by petitioners are not of that character. Any effect which they might have is therefore not a restraint of trade within the meaning of the Sherman Act and since discussion of public issues is not the kind of activity covered by the Sherman Act petitioners' intent and the fact that they employed the so-called "third-party technique" are both irrelevant.

To construe the general terms of the Sherman Act as applying to the kind of public debate and discussion here involved would raise serious constitutional problems and would disregard this Court's rule that a statute will be given an allowable construction that fairly avoids a constitutional issue. The constitutional problems presented by the decision below are demonstrated by the terms of the injunction which the trial court issued as a necessary result of its holding that the statute had been violated by the conduct here at issue. The injunction severely restricts petitioners' rights to appeal to the public, legislators and other government officials, and to support or oppose legislation affecting their competitors. In general terms it also enjoins respondents from saying anything that might be deemed "derogatory" to long distance truckers or which might create "resentment" toward them "in the minds of the

general public". A construction of the Sherman Act which results in such an injunction clearly transcends constitutional limits. Since the substance of the injunction is the necessary result of an erroneous interpretation of the statute, the injunction cannot be cured by revision.

## II.

For the reasons stated above the courts below erred in finding Sherman Act liability even if it is assumed that they correctly concluded that the public relations campaign was not entirely legislative in its purpose and effects. In fact those conclusions should be rejected because they are without any support in the record. There is a complete absence of any proof that the public relations campaign impaired or interfered with the relations between the long distance truckers and their customers. Indeed, respondents made no attempt to prove any such consequences. The conclusions are inconsistent with the particularized findings made by the District Court which show on their face that the campaign was solely legislative both in purpose and in consequences. The conclusions are in conflict with respondents' own explicit statement of the theory of their case and to reach them the trial court had to change drastically the substance of findings proposed by respondents themselves since those proposed findings recognized and accepted the absence of any extra-legislative purpose or effect.

## III.

The decision below must be reversed for the further reason that the respondents failed to show the injury or threat of injury to "business or property" necessary to maintain a private cause of action under the Sherman Act. Injury caused or threatened by legislative action or inaction is not a basis for either damages or injunctive relief under the statute; respondents did not and could not prove any loss or threat of loss of business because of customer hos-

tility; and general public disapprobation of the trucking industry as a whole is not injury to "business or property".

The award of damages to PMTA was plainly improper for an additional reason. PMTA is a non-profit trade association not engaged in the trucking business or any other commercial activity, and thus has no "business or property" subject to injury. Nor can this award of damages be justified on any theory that PMTA could collect damages on behalf of a class of individual truckers. It is settled that under the antitrust laws a trade association has no standing to recover damages for injury to the "business or property" of its members but may recover damages only for injury to itself. *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F. 2d 101 (8th Cir. 1942).

## ARGUMENT.

### I. The Sherman Act Does Not Apply to Petitioners' Activities in Disseminating Arguments and Information on Public Issues and to Construe the Statute as Applying to Those Activities Would Raise Serious Constitutional Questions.

It is not disputed that the activity which the courts below held to have violated the Sherman Act was a public relations campaign. There is no suggestion that petitioners collusively fixed prices; divided territories; cut prices to eliminate competition; organized boycotts; foreclosed markets by tying agreements, stock ownership, or other preemptive arrangements; or otherwise engaged in any of the activities which have traditionally been held to violate the antitrust laws. In short, if the petitioners violated the law in this case it was solely because of their activity in disseminating and publicizing, and causing others to disseminate and publicize, oral and written statements. In considering the legality of their conduct it is therefore necessary to begin by reference to the content of the statements which petitioners disseminated and publicized.

Although there is controversy between the parties as to the nature of petitioners' purpose in conducting the public relations campaign, there can be no controversy about the actual content of the statements disseminated by petitioners in the course of the campaign. The press releases, speeches, magazine articles, films, statistical computations and other writings and statements used in petitioners' campaign consisted solely of arguments for the enactment, preservation, and enforcement of state legislation limiting the weight and size of long-haul trucks, and for the raising of revenue for highway construction and maintenance by increased taxes on trucking operations. The content of

these arguments was in no sense directed to the relations between long-haul truckers and their customers. The arguments did not refer to any particular trucker. They did not disparage the efficiency or quality of the service provided by long-haul truckers or attack their rates as unreasonably high, and they had no capacity to interfere with the commercial relations existing between long-haul truckers and their customers.[12]

The courts below recognized that petitioners' public relations campaign was prompted by a desire to obtain legislative action. In fact, the injunctive relief granted by the District Court, which was found "justified" by the Court of Appeals (R. 218), was almost entirely directed to restricting and controlling the activities of the petitioners in

12. The opinion and the particularized findings of the District Court, to the extent that they deal specifically with the content of the publicity instead of merely characterizing the publicity in terms of its alleged purpose and effect, leave no doubt that the publicity related entirely to the desirability of taxes and weight limitations on long-haul trucking operations. For example, it appears from the District Court's description of petitioners' activities in the State of New Jersey that the speeches and press releases used in that state related to "legislative restrictions on the trucking industry" (R. 50); the District Court's discussion of the magazine articles said to have been inspired by petitioners or to which they contributed material makes it plain that these articles were directed only to such matters as the highway damage caused by heavy trucks and the advantages of weight-distance taxes on heavy trucks as a means for raising revenue for highway construction and maintenance (R. 62-67); the entire discussion in the District Court's opinion of the activities of petitioners in Pennsylvania shows that the content of petitioners' statements in that state consisted of arguments relating to issues raised by a legislative proposal to increase the weight limit on trucks and to the desirability of a weight-distance tax (R. 76-84); and even in the section of its opinion in which the District Court summarized the activities of petitioners believed to be relevant to the charge of "vilification" the court's discussion affirmatively discloses that the statements and arguments involved dealt only with such matters as highway congestion, highway damage, and similar problems created by heavy trucks (R. 84-87). The publicity material and the District Court's findings with respect to it are discussed in more detail at pages 6 to 10, *supra*, and 42 to 46, *infra*.

seeking action by legislatures and government officials and public support for such action. The courts below concluded, however, that petitioners' desire to obtain legislative action was accompanied by a purpose to injure the "good will" of the trucking industry and that in fact the campaign did injure that "good will" and interfered with relations existing between long-haul truckers and their customers. In reaching these conclusions the courts below did not find that petitioners' actions in carrying on the campaign could be divided or classified on the basis of legislative and non-legislative purposes. Rather, they held that the single campaign violated the Sherman Act both in its legislative aspects and because of the purposes and consequences that were asserted to be non-legislative in character.

This holding is erroneous as a matter of law for two reasons. Concerted efforts to bring about economic consequences by valid governmental action do not constitute a conspiracy in violation of the Sherman Act, because economic consequences so achieved are not covered by the statute. And the publicizing of arguments on issues of public policy does not violate the Sherman Act even though accompanied by a purpose to arouse "resentment" in the minds of the public, which includes the customers of the competing industry, and even though it has the effect of arousing such "resentment".

### A. Concerted Efforts to Bring About Economic Consequences by Governmental Action Affecting a Competing Industry Do Not Violate the Antitrust Laws.

Economic consequences brought about by valid governmental action cannot give rise to liability under the Sherman Act. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; *Olsen v. Smith*, 195 U. S. 332, 344-345; *Parker v. Brown*, 317 U. S. 341, 351; *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560; *Okefenokee Rural Elec-*

*tric Membership Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954). Both of the courts below refused to recognize or to apply this principle on the ground that even if petitioners' activities were entirely directed to legislative action they violated the antitrust laws because petitioners were prompted by an intent to injure their competitors and because they used improper means to induce governmental action. This reasoning ignores the premise of the doctrine applied in the cases cited above.[13] In the words of this Court in *American Banana Co. v. United Fruit Co.*, 213 U. S. at page 358, the fundamental reason for the rule "is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."[14] Because a restraint of trade imposed by valid governmental action does not violate the Sherman Act, it necessarily follows that action in concert to achieve such a restraint cannot be a conspiracy to restrain or to monopolize trade within the scope of the Sherman Act, irrespective of intent and of the character of the

13. The District Court properly held that respondents could recover no damages for injuries caused by governmental action and this holding was affirmed by the Court of Appeals. The courts held, however, that the activities of petitioners in inducing the action were a violation of the Sherman Act, and accordingly granted injunctive relief which in large measure is directed against legislative activity (R. 150-151). Thus the courts below erroneously held that conduct which could not give rise to a restraint under the statute for the purpose of damages was actionable for purposes of injunctive relief. See *Graves v. Cambria Steel Co.*, 298 Fed. 761, 762 (S. D. N. Y. 1924).

14. Both the District Court and the Court of Appeals took the view that this holding of the *American Banana* case has been modified or overruled by the later decisions in *United States v. Sisal Sales Corp.*, 274 U. S. 268, and *Steele v. Bulova Watch Co.*, 344 U. S. 280. However, it is plain from the opinions in these later cases that they bear only upon that aspect of *American Banana* that relates to the extra-territorial application of American law and do not touch the holding that economic consequences brought about by valid governmental action are not within the Sherman Act.

means used.[15] Thus, in *United States v. Rock Royal Co-op.*, 307 U. S. 533, where it was specifically alleged that an administrative order had been obtained pursuant to a conspiracy to achieve a monopoly and by fraudulent and unlawful means (see 307 U. S. at pages 556-558), this Court, speaking to those charges, said (307 U. S. at page 560):

> "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act * * *."[16]

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15. In appropriate circumstances, if the governmental action has been induced by means which have duped or defrauded the governmental agencies involved, this may be ground for invalidating the governmental action. Compare *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238. In this case no attack is made on the validity of the governmental action claimed to have been caused by petitioners' activities. Until sovereign action is annulled or set aside the economic consequences it produces can supply no basis for liability under the Sherman Act.

16. Disregard of this principle led the District Court to attempt to draw a wholly artificial distinction between the legislative efforts of petitioners and those of the long-haul truckers. Although both groups used the same methods the District Court held that the efforts of the truckers were lawful under the Sherman Act because the legislative benefits they sought were "affirmative" in the sense that they tended to benefit the truckers, whereas petitioners' efforts were "negative" because they were intended to burden or diminish the competitive power of the truckers (R. 115, 94). The asserted distinction is illusory. The bills sponsored in state legislatures by the truckers to increase weight limitations (which under the District Court's reasoning were prompted by "affirmative" motives) were admittedly designed to take business away from the railroads and thereby to inflict economic injury upon them (¶ 30, R. 269b; R. 127b-129b). Yet petitioners' opposition to those bills was characterized by the District Court as "negative" in purpose and hence unlawful. The definitive comment on this asserted distinction was made by Chief Judge Biggs in his dissenting opinion in the Court of Appeals: "The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison." (R. 228-229, note 15)

B. Petitioners' Publicity Campaign Concerning Issues of Public Policy Did Not Violate the Sherman Act Regardless of Their Motives or Publicity Methods.

The fundamental error of the decisions below cannot be cured by reliance upon the conclusions that petitioners' public relations campaign was prompted in part by a purpose to injure the good will of the trucking industry through creating "resentment" among its customers and that it had the effect of injuring the customer relations of the trucking industry. As we shall show later, these conclusions should be rejected because they are inconsistent with the evidence and with the particularized findings that were made by the District Court. See pages 34 to 46, *infra*. But even if the validity of the conclusions is assumed *arguendo*, the courts below erroneously construed and applied the Sherman Act.

The assumed conclusions do not change the fact that what petitioners actually did was to disseminate and publicize, or cause others to disseminate and publicize, arguments on issues of public policy, specifically issues relating to weight limitations and taxes on truck operations. Nothing else was involved.

In the seventy years of its existence the Sherman Act has never been applied to activity of this kind. From the earliest days of the statute's history, see *Standard Oil Co. v. United States*, 221 U. S. 1, this Court has consistently applied the Sherman Act only to those commercial activities and practices which either directly or by analogy could be regarded as "comparable to restraints deemed illegal at common law"; namely "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market". *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 497-498.

The courts have never held that every act which is detrimental to customer relations or which diminishes the

general popularity of a competing industry is a restraint or monopolization of trade. The practices which this Court has held to constitute violations of the statute have a common characteristic. They are all commercial practices which restrain the free play of competitive forces either by limitations self-imposed by those engaged in the practices or by the exercise of coercive power directed against the commercial freedom of third persons. The debate and discussion of issues of public policy engaged in by the petitioners in this case are not of that character. The public relations campaign did not involve any self-imposed competitive limitations or any exercise of economic power which could compel either respondents or their customers to any course of commercial conduct. The campaign caused respondents themselves to intensify their own campaign to present to the public, including their customers, their own arguments on the issues of legislative policy involved. If this debate affected the state of mind of any customers as members of the public, that effect was not a restraint or monopolization of trade but the result of a voluntary choice made by the customers between competing arguments.

The courts below held that because they had concluded that petitioners' activities were intended to injure the long-haul trucking industry it necessarily followed that those activities violated the Sherman Act. But the question of intent or purpose to injure competitors is not decisive as to Sherman Act liability. The statute is designed to punish and to prevent activities that restrain or monopolize trade or that have an inherent tendency to do so. If in fact activities result in restraint or monopolization or have an inherent tendency to do so, an intent to restrain or to monopolize is not even a necessary ingredient of the offense. *United States v. Griffith*, 334 U. S. 100, 105-107.[17] Innocent or even

17. In the case of an attempt to monopolize, in which a specific intent is a necessary ingredient of the offense, it is still necessary to show that the nature of the activity involved is such as to create a "dangerous probability" of the effects which the statute prohibits. See *Swift & Co. v. United States*, 196 U. S. 375, 396.

laudable motives will not save from the ban of the statute activity of a kind that inherently tends to restraint or monopolization. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457. Similarly, if the nature of the activity involved is such that it does not restrain or monopolize trade within the meaning of the statute, and has no inherent tendency to do so, then it is not unlawful even if prompted by an intent to injure competitors. If the rule were otherwise it would be unlawful for the members of an industry to engage in quite normal activities designed to obtain patronage at the expense of a competing industry as, for example, joint advertising.

In holding that petitioners' public relations campaign violated the Sherman Act the courts below relied heavily upon the ground that petitioners' use of the so-called "third-party technique" was contrary to public policy and illegal. This is not a basis on which antitrust liability can be predicated. Since petitioners' public relations campaign was not the kind of concerted activity that restrains or monopolizes trade or has any inherent tendency to do so, the fact that they used the so-called "third-party technique" as one of the means for carrying on the campaign is irrelevant. This is so even if it be assumed that for reasons unrelated to the Sherman Act this technique is illegal or against public policy. The Sherman Act provides its own standard for determining the legality of concerted action and that standard is exclusive. Concerted action that is otherwise permissible under the Sherman Act does not violate that statute merely because it involves means or methods that may be illegal under other standards that are extraneous to the Sherman Act and unrelated to its purposes. The Sherman Act does not apply to all kinds of wrongs or crimes that may affect interstate commerce. Trespass, the forcible seizure of property, homicide and other acts of violence are concededly unlawful but they are not in and of themselves a basis for antitrust liability, and this is so even if the

acts are done in concert and are intended to and do have economic consequences that are harmful to others. *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Hunt v. Crumboch*, 143 F. 2d 902, 904 (3d Cir. 1944), *aff'd*, 325 U. S. 821.

### C. To Construe the Sherman Act as Applying to Petitioners' Public Relations Campaign Would Raise Serious Constitutional Questions.

The decision of the courts below that the Sherman Act applies to the dissemination of information and argument on issues of public policy raises serious constitutional questions and violates this Court's salutary canon that a statute will be given "an allowable construction that fairly avoids a constitutional issue". *United States v. C. I. O.*, 335 U. S. 106, 129 (concurring opinion); *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459.

The subject matter of all petitioners' publicity related to petitioners' support of or opposition to legislative measures. Thus the question is whether, consistent with the First Amendment, a statute framed in the broadest and most general terms and providing not merely compensation, but the penalty of treble damages and criminal liability, as well as injunctive relief, may be applied to conduct which is admittedly persuasion of the electorate because: (1) the conduct is joint, (2) one purpose and effect of the conduct is found to be to make the electorate, including shippers and potential shippers, think less of the trucking industry, and (3) the ideas and arguments presented are not identified as coming from the source which in fact inspired them.[18]

First, it is too clear to require extended argument that speech which would be constitutionally protected if engaged

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18. The fact that petitioners' publicity was inspired by a commercial motive makes no difference to its status under the First Amendment. See *Cammarano v. United States*, 358 U. S. 498, 514 (concurring opinion); *Smith v. California*, 361 U. S. 147, 150.

in by a single railroad does not lose that protection because it is disseminated by many members of the railroad industry. Joint action with respect to public affairs is a necessary part of a republican form of government and the right of assembly is cognate to that of free speech and petition. Furthermore, as the courts below conceded, a genuine motive of the campaign was persuasion of the electorate and through it the legislatures, and the First Amendment provides in terms that such acts of petition are constitutionally protected whether engaged in individually or as a member of a group. *DeJonge v. Oregon*, 299 U. S. 353, 364.

Second, it would be a severe encroachment upon the right freely to publish discussion and argument on matters of public concern to hold that if in purpose or effect that discussion causes economic injury to another the speaker is liable criminally and can be held answerable for a monetary penalty and bound by an injunction which subjects his future speech to the hazard of citation for contempt. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group of society." *Thornhill v Alabama*, 310 U. S. 88, 104. To subject the right freely and vigorously to express one's views on public issues to the hazard of a subsequent treble damage or criminal judgment based upon the speculation of a court or jury as to motives would render the right of little value. Compare *Tenney v. Brandhove*, 341 U. S. 367, 377.

An intent to advance the economic interests of one group to the detriment of a competing group inevitably exists in all inter-industry controversies: coal against oil and gas; domestic manufacturers against importers; public against private electric power; and in the competitive rivalry among various forms of transportation: railroads, barge lines, steamships, scheduled and non-scheduled airlines and motor carriers. This is the essence of competition. To suggest that public acceptance of the propositions advanced by petitioners' publicity results in a violation of the

Sherman Act because such acceptance results in economic benefits to petitioners and in economic detriment to a competing industry assumes a rule of law that has never before been applied in antitrust or other cases and one that would impose extraordinary restrictions upon political activity and public debate. Such a rule would be in clear derogation of the First Amendment philosophy that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies". *Dennis v. United States*, 341 U. S. 494, 503.[19]

Petitioners do not suggest that one businessman may say anything he wishes about another without being held accountable. The familiar torts of trade libel and commercial disparagement have a history antedating the adoption of the Constitution and have never been considered to run contrary to the guarantees of the First Amendment. Historically the law governing these torts has developed on the basis of certain specific elements, including such matters as the degree of specificity of the references made, their content, the motive which inspired them, and their truth or falsity. The Sherman Act, on the other hand, gives no clue as to whether truth is relevant to legality, the nature of the content of speech which can give rise to liability or any other factors upon which the constitutionality of a statute impinging on the sensitive area of speech might well depend. If the act is to be applied to speech critical of a competitive industry even when, as here, the elements of trade libel or commercial disparagement are not present, the courts, without any legislative guidance, will have to devise rules to

19. The courts below cited *Giboney v. Empire Storage Co.*, 336 U. S. 490, in support of the proposition that the purpose to injure respondents' business which they found to have motivated petitioners' campaign stripped petitioners' speech of constitutional protection. The *Giboney* case, however, which involved picketing intended to coerce an employer into committing an act unlawful under state law, is not in point because (1) it is settled doctrine that picketing, because of its coercive effects on the customers of the picketed establishment, is something more than speech, *Hughes v. Superior Court*, 339 U. S. 460, 464-465, and (2) defendants there were attempting to compel the commission of an illegal act.

avoid the serious First Amendment issues necessarily present. The very generality of the Sherman Act, although not rendering the statute fatally vague when applied to the commercial practices which have been its traditional concern, would throw grave doubt on the constitutional validity of its application in the area of political discussion, for "this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Winters v. New York*, 333 U. S. 507, 509-510, 517-518." *Smith v. California*, 361 U. S. 147, 151.

Finally, despite their own use of precisely the same publicity methods, respondents have insisted, and the courts below have held, that because of petitioners' use of the third-party technique no constitutional questions are raised by the application of the Sherman Act to petitioners' publicity campaign. The constitutional questions raised here cannot be avoided so simply. The courts' holding assumes that the Sherman Act may, consistent with the Constitution, be used to punish or otherwise to inhibit speech on issues of public policy merely because its authorship is anonymous, pseudonymous or otherwise concealed. Any such assumption is wholly unwarranted.

Anonymous and pseudonymous writings have long played an important and familiar part in political affairs for a variety of reasons. See *Talley v. California*, 362 U. S. 60, 64-65. Compare *N. A. A. C. P. v. Alabama*, 357 U. S. 449. Sometimes the purpose has been to escape reprisals. On other occasions, as in the present case, this practice has been followed in the belief that it would increase the probability that the arguments advanced would be considered on their merits instead of being met by diversionary *ad hominem* attacks upon the source which evade and confuse the real issues.[20]

20. Respondents' brief in opposition to the petition for certiorari argues that it is only in the case of oppressed minority groups that

This familiar approach to public persuasion in political and economic matters has impressive historical antecedents. The writers of the *Federalist Papers* employed the technique, see *Talley v. California*, 362 U. S. 60, 65, and so did Thomas Jefferson and Abraham Lincoln.[21] More recently, associations whose sponsors and supporters are undisclosed, and which have successfully resisted occasional legislative efforts to compel disclosure, have become commonplace on the American scene.[22]

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the First Amendment protects speech or writings whose source or authorship is not disclosed. This argument ignores the decisions of this Court in *United States v. Harriss*, 347 U. S. 612, and *Rumely v. United States*, 345 U. S. 41, discussed on the following page 29. It will hardly be suggested that the Committee for Constitutional Government (*Rumely*) or the National Farm Committee (*Harriss*) were organizations of oppressed minority groups whose members stood in fear of reprisal.

21. Thomas Jefferson used the third-party technique in causing the distribution of scores of pamphlets by an acquaintance who was enjoined to keep secret the fact that Jefferson was their source. 9 *The Works of Thomas Jefferson* (Ford ed. 1905), p. 128.

Lincoln, too, recognized the value of seemingly independent press support for the causes he espoused. He quietly acquired a German language newspaper in Springfield, Illinois, permitting the former owner to continue as editor and to appear as proprietor. However, Lincoln had the power to take over this property "any time the newspaper should fail to operate as a faithful Republican mouthpiece and organ." 2 Sandburg, *Abraham Lincoln: The Prairie-Years* (1926), p. 184.

22. For example, in addition to the Committee for Constitutional Government, there is no disclosure of the business sponsors of the Foundation for Economic Education, which publishes books of prominent scholars expressing a conservative point of view. *House Select Committee on Lobbying Activities, Hearings*, 81st Cong., 2d Sess., pt. VIII, 4, 5, 9, 12-20 (1950). Another group, backed by labor interests, which declares that it is a research group, uses the name Public Affairs Institute. *Id.*, pt. VII, 4, 23. The American Fair Trade League, founded in 1913, which was for many years active in support of legislation to permit resale price maintenance, deliberately emphasized that the legislation was sponsored by small independent retailers and concealed the fact that the League itself was controlled by manufacturing interests. See generally, *FTC Report on Resale Maintenance* (1945), esp. 43-45.

Recognition of the fact that any attempt to regulate the right to speak and to publish anonymously or pseudonymously through application of a statute of the breadth and generality of the Sherman Act would create severe constitutional questions is demonstrated in decisions of this Court which have very narrowly construed congressional efforts, through legislation or resolution, to investigate the identity of persons attempting to influence legislation.

In *United States v. Harriss*, 347 U. S. 612, this Court construed the Federal Regulation of Lobbying Act to require a "modicum of information" only from persons engaged in "buttonholing" congressmen through direct communication with them, although the act required registration of and reports from persons seeking "to influence directly or indirectly the passage or defeat of any legislation".[23]

*Rumely v. United States*, 345 U. S. 41, involved a congressional resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote or retard legislation". Noting expressly that its approach to construction of this language was dictated by an effort to avoid difficult First Amendment issues, this Court construed the resolution to authorize investigation not of "the influences that form public opinion" but only of representations made directly to the Congress.

Thus in *Harriss* and *Rumely* conflict with the First Amendment was avoided by construing congressional language as not extending to persons engaged in influencing public opinion even though the language on its face appeared to be directed toward the identity of persons participating in all phases of the legislative process. In contrast to the congressional language involved in those cases, here there is nothing in the language or in the history of the

23. In *National Assn. of Mfgrs. v. McGrath*, 103 F. Supp. 510 (D. D. C. 1952), enforcement of the same statute was enjoined because the three-judge District Court concluded that it violated the First and Fifth Amendments. This Court dismissed the Government's appeal as moot. 344 U. S. 804.

Sherman Act which suggests any intention on the part of Congress to touch the efforts of businessmen to influence popular opinion on questions of public concern. This is therefore an even stronger case than either *Harriss* or *Rumely* for rejection of an interpretation of a statute that would extend it into an area of constitutional doubt.

### D. The Injunction Exposes the Fundamental Error of Applying the Sherman Act to This Case.

The error of the decision below is clearly revealed by consideration of the injunction issued by the trial court. If, as it must, the decree mirrors the acts of petitioners which were thought by the courts below to create antitrust liability (R. 350b), it demonstrates that liability was grounded on activities which were not only beyond the scope of the statute but which were entitled to protection under the First Amendment.

The decree, in sweeping terms, tells petitioners and their officers and employees that they may make no statement that might subsequently be determined to have created "resentment or hostility" toward the long-haul trucking industry "in the minds of the general public" [IV(A)(1), R. 165] or in the minds of "legislators, law enforcement officers or other public officials or members of any branch of Government" [IV(A)(3), R. 165]. Petitioners are enjoined from publishing not only material that is false, but also any material that might be deemed "defamatory or derogatory" of respondents or their business [IV(A)(4), R. 165]. Petitioners are specifically forbidden even to "support" legislation imposing taxes of any kind on truckers, or imposing weight, size or other limitations on the trucking industry [IV(A)(9), R. 166]. These prohibitions apply not only to such activities directed against respondents by name but also to "those generally directed against long-haul truckers as a group" [IV(B), R. 166]. Moreover, contrary to the statement made at page 4 of respondents' brief in opposition to the petition for cer-

tiorari, these prohibitions apply irrespective of whether petitioners employ the so-called "third-party technique".[24]

The injunction cannot be defended on the ground that it is properly designed to protect respondents' commercial relations with their shippers against concerted activities by petitioners which are illegal under the antitrust laws. The fact is that not one of the injunctive provisions discussed above mentions the commercial relations existing between truckers and their customers. These provisions are nothing less than sweeping prohibitions that are designed to restrain the railroads from attempting to influence the public generally and legislators and other government officials to take positions sympathetic to the railroad industry's goals. Under them petitioners will be largely disabled from participating in public debate on major economic and political issues. They will be precluded from arguing to the public or to legislatures that highway user charges are unfairly distributed or that the public is paying a hidden subsidy to the railroads' competitors. The trucking industry has been rendered free of criticism and the public and the legislatures are to be left with but one side of the story.

It is not only because of their constitutional defects that these provisions are plainly improper and unwarranted. They are directed to conduct the effect of which can be felt only through legislation or other governmental action. As we have shown, such conduct cannot give rise to Sherman Act liability. Accordingly these provisions of the

24. The only one of the provisions mentioned above which is in any way qualified by reference to the third-party technique is paragraph IV(A)(9). The part of that paragraph enjoining petitioners from opposing legislation repealing "existing taxes or truck limitations" is conditioned on use of the third-party technique. But even that paragraph flatly prohibits petitioners, without regard to the third-party technique, from "sponsoring, instigating or supporting any legislation for the enactment of ton-mile, weight-distance, highway or other taxes of any kind to be levied on plaintiffs or their business, or weight, size, or other truck limitations" (R. 166).

injunction must fall because they restrain activity which has no tendency or capacity to violate the statute.

The error of the District Court's interpretation and application of the Sherman Act is further demonstrated by the one provision in the judgment which purports to be directed to the issue of interference with the business relations between truckers and shippers. That provision [IV (A)(2), R. 165] enjoins petitioners generally from "seeking to create resentment or hostility to plaintiffs in the minds of those persons who utilize or may utilize the services of the plaintiffs' trucks and in such a manner as to interfere with business relations between shippers and plaintiffs". The District Court's erroneous conclusion that any joint activity which diminishes the general popularity of a competing industry violates the Sherman Act compelled it to draw this injunctive provision in terms which are so vague and broad as to be objectionable both under traditional principles of equity jurisdiction and under the Constitution. Having potential application far beyond the area of trade libel and commercial disparagement, it is the kind of provision which is "so vague as to put the whole conduct of defendant's business in peril of a summons for contempt". *Swift & Co. v. United States*, 196 U. S. 375, 396. Indeed, the inhibitory effect of an injunctive provision so general and indefinite in scope is too extreme to be constitutionally permissible in an area where this Court has properly insisted on an unusually high degree of precision because of the fundamental interests necessarily and intimately involved. Compare *Stromberg v. California*, 283 U. S. 359, 369; *Thornhill v. Alabama*, 310 U. S. 88, 97, 98; *Winters v. New York*, 333 U. S. 507, 509.

Any interpretation of the Sherman Act which results in an injunctive provision of this scope would render the act vulnerable to the same constitutional challenge which invalidated the statute authorizing a general injunction against the publication of a scandalous or defamatory newspaper as held in *Near v. Minnesota*, 283 U. S. 697.

And given the legal premise upon which the District Court acted the provision is incapable of reform since any narrower prohibition would be inconsistent with the basis upon which liability was predicated.

Paragraph IV(A) of the decree purports to limit the prohibitions of the injunction to publicity issued or to other acts done by any petitioner in combination and with the intent of restricting or limiting the growth or expansion of respondents' business (R. 164-165). These limitations in fact, however, do not really restrict the scope of the decree. The element of combination would be present in any instance where a railroad association acted as petitioners' spokesman, and in this as in many other industries it is ordinarily the industry association which publicizes industry positions and expresses the industry viewpoint on legislative and similar matters.[25] Similarly, the requirement of intent does not narrow the prohibitory portions of the decree. Any railroad industry statement critical of the trucking industry could readily be found to have been made with an intent to aggrandize the railroads at the expense of the trucking industry, and railroad advocacy of legislation believed by the railroads necessary to correct competitive inequities would inevitably be undertaken with the knowledge and intent that the further "expansion" of the long-haul trucking industry would be to some extent "limited" if the advocacy were successful. Indeed it was by precisely this kind of reasoning that the District Court reached its conclusion that petitioners' public relations campaign was intended to restrict or limit the growth or expansion of respondents' business.[26]

25. Even if the speech were not an industry program as here, the element of concert would be present whenever a single railroad used an advertising agency.

26. Nor is the sweep of the injunctive provisions that have been discussed above diminished or mitigated by the general provisions of Paragraph V of the final judgment (R. 166). That paragraph provides in part that the petitioners are not prohibited "from seeking legislative, administrative or other governmental benefits for them-

The grounds upon which the trial court found Sherman Act liability logically compelled that court to grant injunctive relief which restrains and restricts the debate and discussion of issues of public and political policy and which controls and regulates the exercise of the right to petition (R. 349b-350b). Such relief has never before been granted under the Sherman Act either to private plaintiffs or to the Government. It is relief which on its face transcends constitutional bounds. The significance of the injunctive provisions of the judgment below goes far beyond any question of error or abuse in the exercise of judicial discretion in framing relief. Those provisions are in themselves a telling demonstration that the courts below have applied the Sherman Act to conduct which it was never intended to reach.

## II. Petitioners' Public Relations Campaign Was Directed Solely to Legislation and Did Not Interfere With Business Relations Between Truckers and Their Customers.

So far we have assumed *arguendo* the validity of the conclusions of the courts below that petitioners' public relations campaign was not entirely legislative in purpose but was also intended to, and did, injure respondents by creating "public resentment . . . in the minds of those who utilized the services of the trucks and in such manner as to interfere with business relations between shippers and truckers" (R. 216, 101).

These conclusions should be rejected because they find no support in the evidence and are in fact inconsistent with the particularized findings made by the District

selves, as distinguished from imposing burdens on plaintiffs". This language does not permit petitioners to engage in any of the activities which are enjoined by Paragraph IV. Any other reading of the language would make the judgment internally inconsistent. Similarly, the last sentence of Paragraph V, which merely permits petitioners to appear before legislative, administrative or other governmental bodies, does not limit or qualify the prohibitory effects of the language of Paragraph IV.

Court.[27] The undisputed evidence and the specific statements made with respect to that evidence in the opinion of the District Court affirmatively establish that petitioners' public relations campaign was solely legislative in both purpose and effect.[28] It follows, as a matter of law, that petitioners' activities fall within the principle that concerted efforts to bring about economic consequences by governmental action do not violate the antitrust laws (see pages 18 to 20, *supra*).

The opinion of the District Court contains a detailed discussion of the organization and planning of petitioners' public relations program and of all the significant steps petitioners took in putting the program into effect. It plainly appears from this discussion that in fact the purpose of the program was solely to arouse the support of the public and through it the support of legislators and other public officials for legislative proposals which would mitigate what petitioners believed were unfair competitive advantages enjoyed by the long-haul truckers as a result of governmental action.

The District Court's discussion of the origin and planning of the public relations program is contained in

27. This Court's review of these conclusions is not controlled by Rule 52 of the Federal Rules of Civil Procedure because the Court is not dealing with findings of fact but rather with general conclusions drawn from facts as to which there is no dispute (R. 61b). Compare *United States v. du Pont Co.*, 353 U. S. 586, 598, note 28; *United States v. Parke, Davis & Co.*, 362 U. S. 29, 44; *United States v. Felin & Co.*, 334 U. S. 624, 640; *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147. However, if the conclusions of the District Court were to be regarded as "findings of fact" within the meaning of Rule 52 then they would be clearly erroneous because there is no support for them in the record and because they are inconsistent with the trial court's more specific findings. The exercise of this Court's undoubted power to review and reject erroneous determinations of fact would be particularly appropriate in this case because of the close connection between the determinations and the constitutional issues that are raised by the decisions below. See *United States v. Felin & Co.*, 334 U. S. 624; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 404.

28. The cursory majority opinion of the Court of Appeals does not purport to discuss the evidence.

a section of its opinion headed "Railroad Activities" (R. 45). The discussion is based on contemporaneous documents produced from petitioners' files and offered in evidence by respondents. Both the text of these documents and the specific statements that the District Court makes about their content show that the public relations program was directed solely to legislation.

The District Court first refers to the fact that before the formulation of the program one of the respondent railroads was considering "a campaign for Federal and State taxes against users of highways, waterways, etc." (R. 46). The exhibit showing these considerations (P-144, R. 191b-197b) refers solely to legislative problems and states, in its concluding paragraphs, " . . . the final test is (a) Who can get the clear facts across to the governors and members of the legislatures? (b) Who can get the votes?" (R. 193b).

Similarly, the purely legislative thrust of petitioners' campaign is evident from the first proposals of the railroad committee which, as the District Court points out, was "the most active and most potent" and "determined on a plan of operation" (R. 47). That plan, set forth in the committee's report (P-199, R. 209b-213b), which the court next discusses, recognizes petitioners' problem in its opening paragraph:

> "The eastern railroads are deeply concerned with the diversion of heavy inter-city freight traffic to the highways. It is felt that this diversion is not justified by the comparative economy between rail and highway transportation but rather that it has resulted from public policy which levies all cost of railroad transportation on the companies which operate the railroads and in turn on the patrons of railroad service. On the other hand the cost of building and maintaining highways used by inter-city trucks is borne principally by tax-paying citizens rather than by the operators or patrons of the service." (R. 209b)

And the concluding page states the solution, which is to "effect the necessary legislation or taxation" (R. 213b).

The court then alludes to the fact that the railroad committee charged with directing the campaign interviewed several public relations firms for the purpose of selecting one to be in charge of the program (R. 47). All of the proposals submitted by these firms (P-3, R. 132b; P-198, R. 199b; D-25, R. 223b; D-26, R. 229b), as the District Court points out, dealt with a campaign of publicity aimed at the public generally (not shippers) "to create a demand for legislation penalizing the truckers either by limitation of size and weight or the imposition of user taxes" (R. 47). The court devotes special attention to the presentation made by Byoir, the public relations firm ultimately retained by the railroads, pointing out that it "laid great stress on the success of that firm in prior legislative campaigns" (R. 47-48). In fact, other than discussing its organization and costs, Byoir's presentation dealt only with its prior success in legislative campaigns. The reason for limiting the presentation to this single subject is given in the document itself, which plainly states that "since, as we understand it, legislative action is necessary to obtain the objectives sought, we are outlining part of our record in this field" (P-3, R. 133b).

That the "objectives sought" in petitioners' campaign were attainable only through "legislative action" was made clear by the next document to which the court refers, describing it as evidencing Byoir's understanding of the campaign's "objectives" (R. 48). That exhibit states (P-5, R. 139b):

> "The objectives of the campaign are clear. They are: to obtain the passage, first in the legislatures of the states of New York, New Jersey and Ohio, and later in the other states of the Conference, of tax measures which will allocate to the heavy trucking industry its fair share of highway construction and maintenance costs."

The District Court found that in the exhibit "the ultimate objective is shrewdly set forth as legislation affecting the truckers", but added that "the intermediate goals . . . also set forth" were "designed and aimed at injury to the truckers". The court clearly recognized, however, that the intermediate objectives were "designed to arouse the public generally of the need to obtain new methods of financing public highways" (R. 48), and the text of the exhibit itself shows that the "intermediate goals" were to arouse public opinion in support of legislative measures and that all of petitioners' activities were to be "directed toward the legislators so that they will act in accordance with the demands of the voters" (P-5, R. 140b). Nowhere in this memorandum detailing the methods, procedures, organization, costs, and objectives of the public relations campaign that Byoir was retained to carry out is there even mention of shippers, much less any suggestion that one objective was to alienate respondents' customers.

The last document referred to by the District Court in this section of its opinion is a Byoir memorandum explaining the program to the Byoir staff (R. 48-49; P-24, R. 162b). Devoted to public and legislative questions, and making no mention of relations between truckers and shippers, it describes the then topical interest in highway construction, damage, and finance, and the then current newspaper stories "calling for appropriate action by state governments" (R. 165b). As the District Court points out, this document shows that petitioners' publicity material was planned to dramatize "highways and heavy trucks in the following particulars:-(1) highway construction costs; (2) highway safety and the part trucks play in lack of safety on the highways; (3) highway damages by trucks; (4) state revenue and expenditures; (5) general taxation stories" (R. 48).[29]

29. Comparison of this document with the classification by subject matter of the publicity material offered in evidence (*supra*, pp. 6 to 8) readily discloses that, in carrying out their campaign, petitioners' publicity was in fact confined to the subjects contemplated when the campaign was initially explained, in P-24, to the Byoir staff.

Thus the very documents which were offered in evidence by the respondents to prove the inception of the campaign, as described by the District Court and as appears from their face, show that petitioners sought only legislation and public support for it.[30]

Similarly, there is no support whatsoever in the record for the lower courts' conclusion that petitioners' activities had the effect of impairing the relations existing between long-haul truckers and their customers. The respondents did not even attempt to prove that any individual trucking company was deprived of business because petitioners' activities impaired its relations with its customers. Nor did they attempt to prove that the long-haul trucking industry as a whole suffered any diminution in traffic, or that the growth of the industry was in any way retarded, during the period of time covered by the alleged conspiracy. Indeed, there is no evidence at all in this case that petitioners' activities produced any economic consequences whatsoever apart from certain speculative losses which individual trucking companies alleged that they had suffered as a direct result of the action of the governor of Pennsylvania in vetoing a bill to increase weight limitations.

The infirmity of the courts' conclusion does not depend upon arguments as to the weight of the evidence or as to whether there is a "scintilla" of evidence which might support it. There is simply no evidence to discuss because there is an absolute and complete lack of proof that the respondent trucking companies, individually or collectively, suffered any loss of business because of impairment of their relations with customers.

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30. The only other exhibit which might be said to outline the purposes of petitioners' program is P-29 (R. 170b), a "Primer for the Staff" of Byoir. It incorporates by reference the legislative objective spelled out in P-5 (R. 139b) and P-24 (R. 162b), both of which are discussed above, and furnishes background information concerning railroads, long-haul trucks, highways, highway damage and finance, and other data of use in the public relations problem of how "to educate the public" (R. 179b) in support of "relief legislation" (R. 178b).

The fact is that respondents tried their case in the District Court on the theory that petitioners' public relations campaign was solely legislative in both purpose and effect. The notion that the campaign was intended to and did impair the relations between long-haul truckers and their customers was an afterthought injected into the case by the District Court after the trial and in flat disregard of respondents' contentions and of the evidence.

In the course of depositions taken before trial respondents were interrogated as to the nature of the alleged injuries said to have been inflicted upon them by petitioners' public relations program. Respondent after respondent admitted that his business had been affected only by the legislative action that petitioners had sought. The answers of Noerr, president of PMTA and of respondent Noerr Motor Freight, Inc. (referred to in the opinion, R. 121), are illustrative. His only example of loss to his company was that it could have lowered its rates if state law had permitted it to carry more lading on each truck (R. 129b-131b). When Noerr was asked about losses resulting from the alleged disparagement he could not give even one event or act or occurrence showing that his business was impeded, nor did he testify to a decline in his volume of traffic or to any other fact from which loss of business could be inferred (R. 130b). The deposition testimony of officers of other respondents was substantially the same (R. 21b-46b).[31]

Consistent with the deposition testimony and their theory of the case, respondents themselves introduced in

31. Indeed, the taking of depositions inquiring into injury allegedly suffered by respondents because of petitioners' activities was finally terminated when respondents stipulated that "the only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955" (R. 47b).

The depositions of truckers other than Noerr, included in the record, were not offered in evidence at the trial. They are referred to here only because of their bearing on respondents' own theory of their case.

evidence the planning documents, discussed above, which show on their face that the campaign was entirely legislative in purpose, and did not offer any proof whatever of injury to their relations with their customers. In argument during the trial and in their requests for findings of fact respondents repeatedly recognized, and indeed asserted, that petitioners' campaign was wholly legislative in its purpose and that their cause of action was based solely on the economic consequences produced by the enactment of legislation or by its defeat. Thus in respondents' brief in opposition to defendants' motion to dismiss under Rule 41(b) they adopted the opening statement of petitioners' counsel (page 6):

> "There can be no dispute that the ERPC program was designed to foster or maintain restrictive legislation against the trucking industry. As Mr. Price said: 'The entire purpose of this program was legislative, either maintenance of the status quo or a change in the way that I have described; . . . ' (N. T. 41)."

In the same brief (at page 5) and in their brief in support of requests for findings (at page 6), respondents stated that "The objective of the campaign was to effect legislation to harass the long-haul truckers . . ." In the former (at page 8), they asserted that 1951 and 1952 ". . . saw the principal accomplishments of the defendants' campaign, including enactment of the ton-mile tax in New York and the veto of SB-615 in Pennsylvania". In the latter (at page 2), they urged that ". . . the conspiracy was successful in obtaining or retaining legislation imposing restrictions on plaintiffs, including the veto of SB-615, and as a result plaintiffs were injured."

At the end of the trial, when all of the evidence was in and respondents were in a position to state definitively the theory of their case, they requested only one finding on the issue of the truckers' injury:

"As a result of the veto of SB-615, plaintiff trucking companies were injured." (Plaintiffs' Requested Finding 55, R. 34)

The District Court's conclusion that petitioners' activities were intended to impair the good will of the trucking industry by interfering with its relations with its customers was not based on any proposed finding of fact submitted by respondents. On the contrary, to reach this conclusion it was necessary for the District Court drastically to change the substance of findings proposed by the respondents and to insert into the proposed findings a concept that was not requested by the respondents and had no support in the record. In their Requested Finding 16 the respondents asked for a finding that the principal means used by petitioners to carry out their conspiracy was the third-party technique for "creating public opinion and thereby procuring legislation . . ." (R. 26). The District Court, by the deletion and addition of words, completely changed the sense of this requested finding by adding to it the notion that the petitioners' effort was to create public opinion "hostile to the trucking industry thereby destroying its good will" (R. 157).[32]

Respondents' recognition that petitioners' activities were solely legislative both in purpose and effect was compelled by the content of the material that petitioners publicized and disseminated. That material cannot reason-

32. The changes made by the District Court in Requested Finding 16 are shown below; the words inserted by the court are italicized and the words deleted have been struck through:

"16. The principal means used by defendants to carry out their conspiracy was the third person technique for creating public opinion ~~and thereby procuring~~ *hostile to the trucking industry thereby destroying its good will with the public and thereafter attempt to secure* legislation (a) imposing or retaining weight restrictions on trucks; and (b) subjecting trucks to ton mile, weight distance or similar taxes, in order to increase their costs of operation and to cause them to lose business (Brief pages 11-12)" (R. 26, 157).

ably be read as designed, or as likely, to discourage shippers from using the services of trucks. Arguments that long-haul truckers do not bear their fair share of the expense of constructing and maintaining highways in view of the economic advantages they derive from the use of the highways, that long-haul truckers have an unfair competitive advantage over the railroads in the nature of a subsidy, that this advantage is increased when existing regulations are not enforced, and that weight limitations and taxes are justified because heavy trucks damage the surface of the highways, injure bridges, and create traffic hazards and congestion are all arguments which by their very terms are addressed to legislative problems and to legislative action. They are not arguments that have any tendency, or indeed capacity, to deter shippers from dealing with the trucking industry. Because the arguments emphasize the competitive advantages which have been given to truckers by legislation it would be more realistic to expect them to cause shippers (who may be assumed to be alert to their own economic interests) to seek to share in these advantages by utilizing truck transportation. Had petitioners' goal been interference with the business relations between truckers and shippers they would hardly have selected means so peculiarly ill-adapted to that end.

The conclusion of the trial court that petitioners' campaign was not entirely legislative in purpose and effect is not only unsupported by the evidence and foreign to respondents' theory of their case but is also inconsistent with that court's own detailed description of what petitioners did in their publicity campaign. In the twenty-odd pages where it described, state-by-state, the activities and accomplishments of petitioners' campaign, the court, in deference to the facts, could not avoid describing them in legislative terms (R. 49-61, 76-84).

Thus, although the court characterized petitioners' publicity in New Jersey as designed "to stir up as much resentment against the trucking industry as was possible",

when it descended to specifics the court noted that the campaign was directed to "the lowering of truck weights and the increase in truck fees" and to the advocacy of a "weight-distance tax whereby users of New Jersey roads would be charged a mileage fee based upon weight and distance travelled on the highways of New Jersey" (R. 50); that the speeches and press releases involved were directed to "legislative restrictions on the trucking industry" (R. 50); that the campaign created a "clamor for a weight-distance tax" (R. 51); that the campaign was successful in its attempt "to arouse the people of New Jersey to strike out at the trucking industry through the method of weight limitations and higher fees" (R. 53); and that the "results of this campaign" were the reduction of "the maximum axle load . . . and a marked increase in truckers' fees" (R. 52).

Similarly, the court summarized what it called "the results of Byoir's work in New York" by adopting part of an ERPC report setting forth as the only significant New York event "The Mileage Tax Bill, which passed the New York legislature" (R. 58; P-231, R. 215b). And in Ohio, where it found that petitioners had "done such 'an efficient job of education' that there arose a public demand for taxation on heavy trucks" (R. 59), the trial court regarded "the rise in fees and the campaign for the weight-distance tax" as "two of the outstanding accomplishments of . . . the entire [railroad] campaign" (R. 60).

Turning to Pennsylvania, where respondents charged that petitioners' campaign "reached a climax" (Complaint, Paragraph 20, R. 8) and caused the only damages they claimed, the court recounted petitioners' activities in opposing S. B. 615 and in advocating a weight-distance tax on trucks. A Byoir internal report, referring to "Defeat of the 'Big Truck' Bill" as an "achievement", was said to have "summarized Byoir's accomplishments from Byoir's viewpoint in helping to bring about the ultimate veto of the bill" (R. 80). The entire Pennsylvania effort, as the court viewed it, was described in the following terms (R. 84):

"Having successfully repulsed the truckers in their efforts to clear Pennsylvania as a bridge state [i.e., veto of S. B. 615], for the next year and up until the institution of this suit the record is abundantly clear that Byoir worked hand-in-hand with Littlefield and with Reiter to promote the introduction and passage of a weight-distance tax. . . ."

And even in that portion of its discussion where the court presumably attempted to marshal all of the facts bearing on the alleged extra-legislative aspects of the campaign ("Campaign of Vilification"), the court summarizes the facts in a way that leaves no doubt that the ultimate objective of petitioners' public relations campaign was legislation:

"By the use of these various media of arousing public resentment, including newspapers, magazines, radio broadcasts and television, Byoir in the area of its operation built a strong base of public resentment. During this period they created so great public resentment against the trucks that it was then a relatively simple problem for Byoir in the public relations field to sell their 'poison' against the truckers, and by the use of already existing organizations friendly to the railroad story, and by reactivating and setting up other organizations, as already noted, to convince people and legislators that everything the trucks did was wrong and that any restriction suggested should be placed upon them.

"The cap of the pyramid, of course, was the projected legislation and the cap of the pyramid differed in each state. In New Jersey it was increased license fees and lowering of weights. In New York it was the weight-distance tax. In Ohio it was first a substantial increase in license fees and next the campaign for the weight-distance tax. In Pennsylvania it was the veto by Governor Fine of the so-called Big Truck Bill to be

immediately followed by a campaign for the weight-distance tax." (R. 87-88)

In fact, to use the trial judge's metaphor, the cap of the pyramid *was* legislation. The petitioners' campaign dealt only with subjects affecting public policy concerning regulation and taxation of trucks. It was not directed, by name or otherwise, at any individual trucker. It was addressed to legislative action and it did not deal with nor was it calculated to have any effect upon respondents' business relationships. The record simply does not support the conclusion of the courts below that petitioners intended to and did "interfere with business relations between shippers and truckers" (R. 216, 101).

## III. No Respondent Has Shown the Injury or Threatened Injury to Its Business or Property Necessary to Support a Judgment for Damages or for Injunctive Relief.

The judgment below should also be reversed because the respondents failed to show the injury or threatened injury to "business or property" which alone can justify the granting of relief under the Sherman Act. The District Court granted injunctive relief to all the respondents, awarded nominal damages to the individual trucking company respondents, and awarded PMTA substantial damages and a counsel fee. No part of this relief can be justified on the basis that the respondents individually or collectively lost business or were threatened with loss of business as the result of customer resentment created by petitioners' public relations campaign, since there was no proof of customer reaction of this kind. It was properly held below that damages cannot be recovered for losses caused by governmental action and the same principles preclude injunctive relief against losses threatened by governmental action.

The District Court took the position that the record established that there had been a "loss of good will to the trucking industry", defining the term "good will" as relating:

"not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but . . . also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." (R. 105)

This definition appears to incorporate two separate conceptions of good will. The first of these—actual or threatened loss of business—may be dismissed from consideration because of the absence of any proof. The second concept embodied in the District Court's definition of good will is ambiguous. It may embody simply the proposition that the trucking industry suffered injury because of public hostility which was or would be reflected in popular opposition to its legislative goals. As has been shown, such injury is not actionable under the antitrust laws. On the other hand the court may have intended to refer to public disapprobation of, and dislike for, the trucking industry as a whole, unimplemented by refusals to deal on the part of customers.[33]

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33. This novel extension of the concept of "good will" is not warranted by authority. It is, for example, inconsistent with the definitions of "good will" made by Lord Eldon and Mr. Justice Story which are quoted in the District Court's opinion (R. 104-105). Those definitions speak solely in terms of customer preference.

The notion that an industry as a whole can possess "good will" as a legally cognizable property right is untenable. Hitherto "good will" has been recognized only as something appurtenant to an individual business entity which distinguishes that entity from others engaged in the same line of activity. It does not exist in gross. By definition it cannot be shared by all those engaged in an industry. This appears from the definitions of Lord Eldon and Mr. Justice Story referred to above, with which compare 1 Nims, *Unfair Competition and Trademarks* (4th ed. 1947), § 13, p. 79.

But this kind of diminution in general popularity is in no sense injury to "business or property" because, by hypothesis, it involves no actual or threatened monetary loss.

Even if it could be assumed that petitioners' conduct is of a kind potentially subject to the antitrust laws and that an industry as a whole could possess "good will", individual members of that industry cannot recover for statements which refer to the entire industry and do not mention the individuals by name or otherwise identify them as the object of the statements. The law of defamation provides a useful analogy. It has long been the rule that if what otherwise might be actionable disparagement is directed to a large group or class it is not defamatory and does not give rise to a cause of action in a member of the group or class unless some particular circumstances point to that person as the one defamed. Compare *Restatement, Torts* § 564, comment c; *Service Parking Corp. v. Washington Times Co.*, 92 F. 2d 502 (D. C. Cir. 1937); *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303, 305 (D. D. C. 1948), *aff'd*, 182 F. 2d 377 (D. C. Cir. 1950); *Watts-Wagner Co. v. General Motors Corp.*, 64 F. Supp. 506 (S. D. N. Y. 1945); *Neiman-Marcus v. Lait*, 13 F. R. D. 311 (S. D. N. Y. 1952). The very size of the group about which petitioners spoke (the whole long-haul trucking industry) together with the content of the statements disseminated by petitioners shows that their publicity was fair comment on matters of public interest and hence could not injure any legally protected interest of the respondents. See *Golden North Airways v. Tanana Publishing Co.*, 218 F. 2d 612, 626, 627 (9th Cir. 1954), and *Golson v. Hearst Corp.*, 128 F. Supp. 110, 112 (S. D. N. Y. 1954).[34]

34. The broad nature of petitioners' publicity is emphasized by the form of decree the District Court thought appropriate to the circumstances of this case. Its injunction prohibits "activities generally directed against long-haul truckers as a group . . . in so far as they affect plaintiffs because they affect the group (long-haul truckers) of which plaintiffs are a part" [Final Decree, IV(B), R. 166].

Apart from what has been said above there are additional and independent reasons why the award of damages to PMTA was improper and should be reversed. PMTA is a non-profit incorporated trade association whose membership included most but not all of the trucking company respondents and also many other truckers who are not parties to this case. PMTA is not engaged in the trucking business or in any other commercial activity and none of the legislation involved in this case related to it.

All of the relief granted by the District Court rests on the assumption that petitioners' activities inflicted injury upon the business of individual long-haul truckers or upon the business of the long-haul trucking industry considered as a whole. Since PMTA is not engaged in the business of trucking, alleged injury to that business, whether by interference with truckers' customers (PMTA has no customers), by the inducing of legislative action adverse to the trucking industry, or by injury to the "good will" of the trucking industry in some vague and general sense, is not injury to the business or property of PMTA.

The District Court's award of damages to PMTA does not even purport to rest on any finding that the business or property of PMTA was injured. The damages were simply computed on the basis of amounts spent by PMTA in carrying on a public relations campaign similar to the campaign conducted by petitioners (R. 146, 346b-349b). These amounts cannot be regarded as spent to mitigate damages which might otherwise have been inflicted upon the business or property of PMTA since admittedly the alleged injuries were threatened not to its own business or property but to the business or property of its members.

Indeed the District Court did not award damages to PMTA on its own behalf but only as "the representative of the trucking industry in Pennsylvania" (R. 146). It is well settled, however, that under the antitrust laws a trade association has no standing to recover for injury to the

business or property of its members. It has standing to recover only for injury to its own business or property. *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F. 2d 101 (8th Cir. 1942); *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N. D. Ala. 1939); *Northern California Monument Dealers Assn. v. Interment Assn. of Calif.*, 120 F. Supp. 93 (S. D. Cal. 1954).[35]

In their brief in opposition to the petition for certiorari the respondents attempt to deal with this point by asserting that it was not raised by petitioners in the District Court and was therefore waived (page 7). This assertion is contrary to fact. In the District Court the petitioners squarely took the position that PMTA "has no standing to maintain the action or collect damages."[36]

Accordingly, whatever view is taken of the District Court's holding that the Sherman Act applied to petitioners' public relations campaign, there was no injury or threat of injury to the business or property of PMTA and, ac-

35. In their brief in opposition to the petition for certiorari and in the Court of Appeals respondents cited *American Cooperative Serum Assn. v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), *cert. denied*, 329 U. S. 721, for the proposition that a trade association may seek treble damages under the antitrust laws. However, the plaintiff in that case was actually engaged in the business of buying and selling serum and thus was in a position altogether different from that of PMTA.

36. Thus, in their "Brief in Opposition to PMTA's Claim for Damages", petitioners said (page 6):

> ". . . defendants believe that the Court recognizes their objections to the award of any damages to PMTA. It remains defendants' position that none of the activities for which PMTA seeks reimbursement of expenses constituted a defensive campaign. It is defendants' contention that all of these Allied activities were directed toward and represented a part of PMTA's program for legislation. Furthermore, it is defendants' position that PMTA, as a trade association, has no standing to maintain the action or collect damages. Since PMTA merely passed on to its members the increased costs of the public relations campaign, these increased costs cannot be recovered on the theory that they represent damage to PMTA."

cordingly, PMTA is not entitled either to injunctive relief or to the $652,074 in damages and the counsel fee which the District Court awarded it.

There is therefore no basis for an award of any relief to either the individnal trucker respondents or the PMTA.

## CONCLUSION.

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter judgment for petitioners.

Respectfully submitted,

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September 1, 1960

## APPENDIX.

### THE STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •"

2. Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2, provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolze any part of the trade or commerce among the several States, or with the foreign nations shall be deemed guilty of a misdemeanor • • •"

3. Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee • • •"

4. Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, provides in pertinent part as follows:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ."

5. The First Amendment of the Constitution of the United States, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

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IN THE

# Supreme Court of the United States

**October Term, 1960.**

**No. 50.**

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,

*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

# BRIEF FOR RESPONDENTS.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.,

*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

## BRIEF FOR RESPONDENTS.

### QUESTIONS PRESENTED.

1. Where the District Court found as a fact that petitioners combined and conspired with the specific intent of eliminating respondent trucking companies as competitors in the long-haul freight business, in order to monopolize that business for themselves, and the Court of Appeals sustained that finding as soundly based on substantial evidence, are petitioners exonerated from liability under the Sherman Act because the means they employed to achieve their illegal objective included, among other activities, a public relations campaign against respondents (in which petitioners' role was concealed and disguised), to procure state governmental restrictions against respondents to put them out of business, in direct conflict with the national transportation policy declared by Congress?

2. Where respondents, other than PMTA, were injured as a result of petitioners' conspiracy to eliminate them as competitors in the long-haul freight business, but agreed by stipulation to limit their claims for actual damages in order to expedite the trial, relying on their association, PMTA, to recover the amounts spent in defense against the conspiracy, a right which petitioners did not question or deny, until after their liability to PMTA for such damages had been determined: (a) were respondent trucking companies properly awarded nominal damages when they proved injury to themselves; (b) was respondent PMTA properly awarded damages representing the amounts spent by it in defense against the conspiracy and (c) were respondents properly granted an injunction against continuation of the conspiracy to eliminate their competition, where the District Court found that petitioners intended to resume their activities, unless enjoined?

## STATUTES INVOLVED.

Respondents agree with petitioners' citation of the statutes involved, but deny that any substantial question arises under the First Amendment of the Constitution of the United States.

## STATEMENT OF THE CASE.

### A. Petitioners' Objective.

Respondents pleaded and the District Court found that (1) petitioners combined and conspired with the specific intent and for the purpose of eliminating respondent trucking companies as competitors of petitioner railroads in the long-distance hauling of freight in interstate commerce, and (2) performed hundreds of overt acts to achieve their goal (R. 5, R. 25-26, ¶ 12, R. 106).[1]

Petitioners' brief ignores the finding of their intent to destroy respondents as competitors and to monopolize the long-haul freight business in northeastern United States for themselves; sloughs over the many acts other than the dissemination of literature on truck road damage for the purpose of procuring truck weight and tax legislation; and implies that their propaganda was published merely anonymously, whereas actually it was affirmatively misrepresented as coming from other sources like the Grange, associations of public officials, citizens' groups and "front" organizations created or activated by petitioners.

These fundamental findings of the District Court, affirmed by the Court of Appeals, along with the other findings of fact, as "soundly based on substantial evidence" (R. 216)[2] were not directly challenged by petitioners in the Court of Appeals, nor do they directly challenge them here. At the very most they state obliquely that "there is

1. References to "¶" are to Findings of Fact made by the District Court, pursuant to Respondents' requests. The District Court's rulings on these requests appear at R. 157. Extensive narrative findings of fact are set forth in the District Court's opinion (R. 41-101).

2. Under the practice of the third circuit the opinions of the court are circulated among all seven members of the court, including those not on the panel hearing the case. Rehearing is ordered when a majority of the court so votes. *United States v. United Steelworkers of America*, 271 F. 2d 676, 694 (3d Cir. 1959). It would appear from the Per Curiam opinion (Chief Judge Biggs dissenting) that all the judges except Judge Biggs concurred in the order and did not favor rehearing here.

dispute between the parties as to the purposes which motivated this campaign" (Petitioners' Brief, p. 12). This, of course, is not the same as asserting that the District Court's findings as to petitioners' purpose and intent are not supported by the evidence, and nowhere do petitioners make such assertion. And whatever dispute may have existed has now been resolved in favor of respondents' contention by the District Court.

The finding is supported by the direct admission of Girdler, the agent in charge of petitioners' campaign (R. 177-178), and counsel for petitioners admitted in the District Court that fundamentally the facts claimed by appellees were not controverted (R. 61b).

Girdler testified that petitioners' objective was to confine trucking companies, such as respondents, to short-haul business, leaving long-haul freight exclusively to petitioners (R. 169, R. 177-178). The distinction he made between long-haul and short-haul is significant. When petitioners think it profitable for themselves to carry the particular freight the distance in question, it is long-haul, but if the railroads do not want to handle it, then it is short-haul (R. 176). In a written memorandum of petitioners' objectives Girdler stated that limitation of trucks to short hauls, leaving long-hauls to the railroads, was the national transportation policy declared by Congress (Pl. Ex. 24, R. 162b, R. 177-178). This, of course, is a complete distortion of the Congressional policy, for, as this Court recently had occasion to point out, it is the national transportation policy to safeguard over-the-road trucking from invasion or domination, and, a fortiori, therefore, from elimination, by the railroads. See *American Trucking Associations v. United States*, 364 U. S. 1. Girdler's memorandum was approved by petitioners' key executives, including the president of the Pennsylvania Railroad, who supplemented it with suggestions of his own for materially reducing trucking company earnings (Pl. Ex. 26, R. 189-190, R. 172-173).

Respondents, long-haul truckers, were the direct target of petitioners' campaign (R. 181). Constituting about five

per cent. of the trucking industry, they were labelled by petitioners as "five percenters". The label was really intended, however, "to capitalize on the nefarious meaning given that term as a result of the (then) recent Senate investigation", which did not involve respondents at all (Pl. Ex. 29, R. 173b). Petitioners' plan was to "isolate" respondents, to split them from the rest of the industry (R. 178-179). The plan was "largely negative aimed directly at the trucks" (Def. Ex. 28, R. 213) and was intended "to make long-haul trucking more expensive", and this at a time when there was a serious freight car shortage, as a result of which the railroads were not even in a position to handle any greater volume of business (Pl. Ex. 207, R. 207, Pl. Ex. 261, R. 208). As one of petitioners' own committee members said, it was "like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it" (Def. Ex. 28, R. 213).

Petitioners concede that they sought their objective in combination.

### B. The Means Employed by Petitioners to Achieve Their Objective.

Petitioners in achieving their objective of eliminating long-haul truck competition, attacked and vilified the long-haul truckers through a barrage of propaganda issued by Byoir in the names of organizations of farmers, township officials, motorists and so forth, in order to disguise and conceal their own role, and the fact that they were preparing, paying for and disseminating the material themselves[3] (¶ 19-26, R. 27-28).

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3. The "third party" public relations technique was effectively used by Byoir in a prior campaign, in which Byoir was convicted of violating the anti-trust laws. *United States v. New York Great Atlantic & Pacific Tea Co., Inc.*, 67 F. Supp. 626, 673-74 (1946), aff'd 173 F. 2d 79, 89-90 (7th Cir. 1949). It had also been used by the railroads in the 1930's to restrain interstate trucking, as found by the Wheeler Committee of the United States Senate (¶¶ 17, 18, R. 26 to 27).

For example, Byoir "formed the Empire State Transport League in New York because we needed an organization that could legitimately mail all types of propaganda on the general subject of trucks and highways", suggesting at the same time that the railroads should "put the arm" on their suppliers and other industries to get them to go along with the purposes of the conspiracy (Pl. Ex. 35, R. 198). The Transport League was ostensibly an organization of highway users. Volume II of the Record graphically demonstrates how such material, all prepared and paid for by petitioners, was issued in the names of such organizations as the Empire State Transport League (R. 383b-385b, 441b, 522b-524b); the New Jersey Automobile Owners, Inc. (R. 393b-440b, R. 444b-472b, 550b-553b, R. 556b); the New Jersey Citizens Tax Study Foundation (R. 442b-443b, R. 473b-477b); the Citizens Highway Committee (R. 442b-443b, R. 473b-477b); the Citizens Tax League (R. 386b-391b); the Pennsylvania State Grange (R. 485b-486b, 514b-515b, R. 531b-535b); the Bureau of Public Roads of the State of Ohio (R. 507b-509b); and the Pennsylvania State Association of Township Supervisors (R. 510b-513b, R. 530b, R. 549b).

In all of this material the railroad connection was concealed. The Byoir plan, described euphemistically by it, was "not (to) have a client for attribution", and to create not only the publicity, but also "the groups and occasions" for its dissemination (Pl. Ex. 24, R. 168b). The railroads were to be kept out of it, and this was done by such means as Byoir's false representations that its employees were working not for the railroads, but for other organizations, such as the Grange (Pl. Ex. 109, R. 200-201, R. 45, R. 32-33). In some instances this technique was illegal under state law (¶ 47, R. 33, R. 77), and the Federal Communications Act (R. 136-137).

Byoir described its own anti-truck material as "poison" to be perpetrated "upon the defenseless public" (Pl. Ex. 148, R. 202). They boasted of their "ace ghost-

writer" who developed a story entitled "History, Trucks and Money" which appeared over somebody else's by-line, without any disclosure as to its source, in the National Grange Monthly. It was sent by a vice-president of the Pennsylvania Railroad to Milton Eisenhower, then president of Pennsylvania State College, as though the railroads had had nothing to do with it (Pl. Ex. 174, Pl. Ex. 178, R. 202-204, ¶ 33, R. 29-30). Similarly, Byoir used Mrs. Bessie Q. Mott, Chairman of the Public Affairs Department of the New York State Federation of Women's Clubs, to issue anti-truck pamphlets in her name and to organize forums, without disclosing the fact that she was on retainer by the railroads, and that her performance would determine whether she would continue to be used and paid "when the fight would get hot" (Pl. Ex. 16G, R. 379b, Pl. Ex. 12, R. 537b-543b, Pl. Ex. 11, R. 186).

Petitioners were responsible for the preparation and dissemination of national magazine articles and other syndicated material which appeared over the names of apparently disinterested professional authors attacking long-haul truckers under such titles as "The Giants That Wreck Our Highways" (Pl. Ex. 49, R. 548b-549b); "The Rape of Our Roads" (R. 562b-563b); and "Trucks Wreck Your Roads" (R. 575b-578b), or which depicted horrible highway accidents involving heavy trucks (R. 561b), the theme throughout being that heavy trucks are solely responsible for damaging and destroying the highways, and for the sensationally depicted highway accidents. The railroad source of all of this material was concealed (¶ 19, 25, 28, 29, R. 28-29).

Petitioners financed and caused to be published in the names of third parties, ostensibly independent surveys, polls and reports, which were neither independent nor impartially compiled, and which repeated the anti-truck line. Petitioners' role was again concealed (¶ 27, R. 28).

They labelled respondents not only as "five" percenters", which connoted "fixers", but also as "evil,

sinister wrongdoers" and villains (Pl. Ex. 29, R. 173b, Pl. Ex. 23, R. 187).

Byoir agents and others worked behind the scenes with public officials and legislators to influence their reports and other official actions adversely to respondents, without disclosing the railroad connection (¶ 34, R. 30, R. 83).

None of these facts, all the subject of findings by the District Court, and all designed to achieve petitioners' illegal objective is challenged by petitioners. As stated by Byoir: "In the campaign to follow, every action, from the major statement by the most important witness before a legislative committee on down to the briefest leaflet distributed in Hohokus, must be consistent with that platform" (Pl. Ex. 5, R. 141b).

### C. The Impact of the Conspiracy on Respondents.

The unlawful object of petitioners' combination and conspiracy—elimination of long-haul truck competition—was plainly calculated to injure respondents. The injury was not exclusively legislative. The attacks on respondents were primarily directed to the public at large, including respondents' shippers and customers. The immediate aim was to foment resentment and hostility. As the District Court found, the truckers, without justification "were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way" (R. 105). The campaign was also intended to and did result, according to petitioners' own claims, in legislative and executive action which adversely affected respondents, by imposing on them burdensome restrictions as to size and weight limitations and ton-mile taxes (Pl. Ex. 53, R. 80-82). The District Court found that petitioners succeeded in procuring weight restrictions in New Jersey and retaining weight restrictions in Pennsylvania, and in procuring a ton-mile tax in New York, which they were also seeking to procure in New Jersey, Ohio,

Indiana and Pennsylvania (¶ 40 and 41, R. 32). The weight restriction thus maintained in Pennsylvania as a result of petitioners' activities, left in effect an "interstate trade barrier", since the Pennsylvania limit was 45,000 pounds in contrast to 60,000 pounds in all surrounding states, except West Virginia, where it was 58,400 pounds (¶ 42, R. 32).

A stipulation was entered into solely in order to expedite commencement of the trial, whereby the individual trucking companies limited their money damage claims to the injury resulting from the Pennsylvania veto. For other damages, they relied on the claim of their association, PMTA, to recover for its expenditures in defending against the conspiracy. Petitioners never questioned PMTA's standing to recover such damages until after the trial, when their liability to PMTA had been determined. If that issue had been timely raised by petitioners, the other respondents would never have stipulated away their own damage claims, other than those arising from the veto, and would clearly have been entitled to recover, at the very least, the amounts paid by them to their association to enable it to conduct the defense. As it is, they were awarded nominal damages, because of the fact that they were actually injured by the conspiracy. Indeed a memorandum prepared by petitioners was put in evidence at the trial showing that petitioners had actually calculated in advance the loss which would be sustained by several of the individual respondent trucking companies as a result of one phase of petitioners' conspiracy (Pl. Ex. 169).

## SUMMARY OF ARGUMENT.

### I.

The District Court found that petitioners combined and conspired for the purpose and with the specific intent of eliminating respondents as competitors in the long-distance hauling of freight in interstate commerce, carrying out hundreds of overt acts to achieve their goal. Petitioners do not challenge this basic finding of fact, and the Court of Appeals held that it, together with all the other findings was "soundly based on substantial evidence". Such a combination and conspiracy clearly violates the Sherman Act. The fact that one of the means of achieving that unlawful end included the fomenting of legislative restrictions and burdens on respondents, by acting through "front" organizations and concealing petitioners' role, does not exonerate petitioners from liability. This Court so held in *United States v. Sisal Sales Corp.*, 274 U. S. 268, and this principle has been sustained by the overwhelming weight of authority in the Courts of Appeal and District Courts.

Petitioners falsely represented that their unlawful objective coincided with and was carrying out the national transportation policy declared by Congress, whereas, as this Court has pointed out, that policy militates against invasion and domination of the over-the-road trucking field by the railroads, and a fortiori, therefore, against elimination of such competition. See *American Trucking Associations, Inc. v. United States*, 364 U. S. 1. It would be anomalous if such conduct by petitioners were to be deemed privileged, when specifically intended to achieve interstate restraints contrary to federal policy.

The fact that petitioners employed public relations techniques to achieve their objective, carries no privilege. To outlaw conspiracies in restraint of trade has never been deemed an abridgement of freedom of speech or press,

merely because they are carried out by means of spoken or written matter. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502. Petitioners' technique of attacking respondents under the false guise of organizations of farmers, motorists, township officials and even official state bureaus was not merely a campaign of anonymous publicity, but constituted active fraud and deception, and so, quite apart from the unlawful purpose, is illegal. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238; *Marshall v. The B. & O. Railroad Co.*, 16 Howard (57 U. S.) 314.

The injunction is narrowly framed so as to prohibit only acts done pursuant to the unlawful conspiracy, leaving petitioners free to act individually or for other purposes. The acts enjoined consist principally of concealment of petitioners' part in disseminating material defaming respondents. The injunction specifically states it does not apply to efforts by petitioners to obtain legislative benefits for themselves. An injunction against a conspiracy of this nature is not unconstitutional just because it prohibits conduct made effective by spoken or written matter. *Giboney v. Empire Storage & Ice Co., supra; Chamber of Commerce v. F. T. C.*, 13 F. 2d 673, 686, 696-697 (8th Cir. 1926). The requirement of disclosure is also well established as an appropriate remedy for evils found to be violative of federal policy. *United States v. Harriss*, 347 U. S. 612; *Bantam Books v. F. T. C.*, 275 F. 2d 680 (2d Cir. 1960). No case, not even those like *Talley v. California*, 362 U. S. 60, which permit certain oppressed minority groups who might otherwise be intimidated in their exercise of free speech (certainly not the nation's most powerful railroads), to publicize their legitimate grievances anonymously, protects as free speech the publication, through "front" organizations, with deliberate misrepresentation of its source, of defamatory material pursuant to a conspiracy whose object is to restrain and monopolize interstate commerce.

## II.

Respondent trucking companies, as found by the District Court, were injured as a result of petitioners' combination and conspiracy to eliminate them as competitors. To expedite the commencement of the trial, they stipulated that they would not seek to recover actual damages, except for those flowing from the Governor's veto of the Pennsylvania increased weight limit bill, held by the courts below not to be recoverable. These respondents relied on their association, PMTA, to recover damages resulting from amounts spent in defense against the conspiracy. Petitioners never pleaded the defense that PMTA had no standing to recover such damages, thus waiving that defense under F. R. C. P. 12(h). Nor did they even raise the issue until after their liability to PMTA had been determined following a lengthy trial. If the defense had been timely raised, the other respondents would never have stipulated away their own losses sustained as a result of their expenditures in defense against the conspiracy, so that it would be manifestly unfair to permit PMTA's recovery to be challenged now. PMTA's damages were limited to its expenditures made in direct defense against the conspiracy, and it was injured in its own property within the meaning of the Clayton Act.

Injunctive relief is justified, in view of the finding that petitioners intended to resume their activities, for the same unlawful purpose, unless enjoined.

## ARGUMENT.

### I. Petitioners' Combination and Conspiracy to Eliminate Respondents as Competitors in the Interstate Hauling of Freight Clearly Violates the Sherman Act.

The finding of the District Court that petitioners combined and conspired with the intent and purpose of eliminating respondent trucking companies as competitors in the long-distance hauling of freight in interstate commerce, affirmed by the Court of Appeals, stands unassailed. All of petitioners' activities were found to have been carried out for that purpose. Such a combination is clearly in violation of the Sherman Act, which "forbids combinations of traders to suppress competition", *United States v. Parke, Davis and Company*, 362 U. S. 29. This is true regardless of whether the means would be legal or privileged in the absence of the illegal purpose. *American Tobacco Company v. United States*, 328 U. S. 781, 789.

Nowhere in their brief do petitioners squarely face this issue, and their entire argument is predicated upon their ignoring this incontrovertible finding as to their unlawful purpose. The closest they come to discussing it is the assertion that "*if* the nature of the activity involved is such that it does not restrain or monopolize trade within the meaning of the statute, and has no inherent tendency to do so, then it is not unlawful even if prompted by an intent to injure competitors" (Petitioners' Brief, p. 23). A combination of the nation's most powerful railroads to destroy truck competition has such an "inherent tendency." In *Standard Oil Co. v. United States*, 221 U. S. 1, 76, it was deemed significant that the methods used by the defendants "necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." And commenting on *Standard Oil*, in *United States v. American Tobacco Co.*, 221 U. S. 106, 179, the Court said:

> "Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade or which, either because of their inherent nature or effect, or *because of the evident purpose of the acts*, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

This was cited with approval in *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 211.

The fact that petitioners did not succeed in their objective of completely eliminating respondents' competition is immaterial in the light of the finding of their specific intent to restrain trade and to monopolize, since the dangerous probability of success is presumed to be consequent upon such specific intent. *Swift and Co. v. United States*, 196 U. S. 375, 396; *United States v. Columbia Steel Co.*, 334 U. S. 495, 525. On this campaign alone petitioners spent over two and a quarter million dollars (¶ 15, R. 26). With their assets of $15,000,000,000 and annual operating revenues in excess of $4,000,000,000 (¶ 9, R. 25), they had the power to inflict much greater injury, if permitted to continue.

Petitioners acknowledge in their petition for certiorari that "the statute is sufficiently flexible and adaptable to be extended to new practices that properly fall within its scope. . . ." Cf. *Standard Oil Co. v. United States*, 221 U. S. 1, 59-60 (1911); *Klor's v. Broadway-Hale Stores*, 359 U. S. 207, 211. No extension is necessary to apply it in the circumstances of this case. The case of *Apex Hosiery Co. v. Leader*, 310 U. S. 469, a labor union dispute, is not in point, since that did not involve a combination to eliminate

competition. If the activities in that case had been undertaken by a combination of competitors, there would have been a violation of the Sherman Act.

## II. Petitioners Are Not Exonerated From Liability Under the Sherman Act Because the Means Employed to Achieve Their Illegal Objective Included Among Other Activities Efforts to Procure State Legislative and Executive Action.

Falsely representing that they were carrying out the national transportation policy declared by Congress,[4] in seeking to limit trucks to short hauls and to monopolize long-haul freight for themselves, petitioners, as part of their campaign, procured and sought to procure, the imposition of state governmental restrictions and burdens on respondents in the form of size and weight limitations, and ton-mile taxes (¶ 40 and 41, R. 32).[5] Their campaign was based on fraud and misrepresentation, since the unimpeached findings of the District Court show that petitioners masqueraded as the Pennsylvania Grange, as the Pennsylvania Association of Township Supervisors (which by statute was forbidden to engage in such activities) (¶ 47, R. 33), as motorists associations, and so forth. They worked behind the scenes with government officials, succeeding even in getting their statistics, loaded against the trucking industry, before the Governor of Pennsylvania and his

4. The national transportation policy, as actually declared by Congress, and interpreted by this Court militates against invasion of the motor-carrier field by the railroads and weakening "the safeguards which have been painstakingly erected to prevent railroad domination of trucking." *American Trucking Associations, Inc. v. United States*, 364 U. S. 1.

5. The District Court found that it was "the purpose and intent" of petitioners "to hurt the truckers in every way possible *even though they secured no legislation;* it was their purpose to restrict the activities of the truckers in the long-haul industry to the greatest extent possible, and finally, if possible, to drive them out of that segment of the entire transportation industry" (R. 88). That aim is nowhere disavowed in petitioners' brief.

Secretary of Highways, in the guise of a report of the assistant chief engineer of the Department of Highways (R. 83).

Even in the absence of a prohibited Sherman Act combination, this Court has sustained a cause of action for damages resulting from legislation procured by one person, through misrepresentation, to the injury of another. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 151 U. S. 1. Where a combination and conspiracy in violation of the Sherman Act are involved, liability is clear even though procuring legislation is one of the means used. *United States v. Sisal Sales Corporation*, 274 U. S. 268, 276. That decision, and *Steele v. Bulova Watch Co.*, 344 U. S. 280, as pointed out by the Court of Appeals here, limit *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, to holding that the Sherman Act cannot be invoked against persuading a foreign sovereign to act within its own jurisdiction, where there is no effect within the United States. By contrast, as stated in *Sisal*, expressly rejecting any broader holding for the *Banana Co.* case: "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U. S. at p. 276.

It would indeed be anomalous if the actual national transportation policy declared by Congress, as against what petitioners falsely said it was, could be frustrated by a series of state restrictions, procured by the railroads to burden the trucking industry, which taken individually, might be within the valid police or taxing powers of the individual states, but in sum total were calculated by the railroads to cripple interstate trucking.[6] Here petitioners

6. Even a state cannot bar interstate motor carriers from use of state roads as punishment for repeated violations of state highway regulations. *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61. Nor may a state restrict interstate transportation by legislation whose "primary purpose is not regulation with a view to safety or to con-

procured weight restrictions on respondents in New Jersey and Pennsylvania and a ton-mile tax in New York, and were extending their operations in other northeastern states (¶ 40 and 41, R. 32). It is significant that petitioners' campaign against interstate trucking was not directed to the Congress of the United States, but to state legislatures and officials, which actually have no concern with enacting the national transportation policy.

Consistent with the holding of the *Sisal* case, *supra*, it has repeatedly been held that combinations in restraint of trade or to monopolize, similar to the conspiracy here, are not exempted from the scope of the antitrust laws merely because some or all of the means used by the conspirators involve contacts with legislative, judicial or other governmental agencies which would otherwise be privileged or even constitutionally protected in the absence of the illegal purpose. *Atchison, Topeka & Santa Fe Rwy. v. Aircoach Transport Ass'n*, 253 F. 2d 877 (Ct. of App. D. C. 1958); *Riss & Co., Inc. v. Association of Western Rwys.*, 159 F. Supp. 288 (D. D. C. 1958); *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Parmelee Transportation Company v. Keeshin*, 144 F. Supp. 480, 484 (N. D. Ill., 1956). See also *Slick Airways, Inc. v. American Air Lines*, 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed, 204 F. 2d 230 (3d Cir. 1953), cert. denied, 346 U. S. 806; *United States v. Krasnov*, 143 F. Supp. 184 (E. D. Pa. 1956), aff'd 355 U. S. 5; *Forgett v. Scharf*, 181 F. 2d 754 (3d Cir. 1950); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F. 2d 416, 424-5 (10th Cir. 1952).

*Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954), relied on by petitioners, has clearly been limited by the subsequent decisions in *Crummer v. DuPont*, 223 F. 2d 238 (5th Cir.

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servation of the highways but the prohibition of competition". *Buck v. Kuykendall*, 267 U. S. 307. Cf. *Atchison, Topeka & Santa Fe Rwy. Co. v. City of Chicago*, 240 F. 2d 930, 940 (7th Cir. 1957), aff'd 357 U. S. 77.

1955) and 255 F. 2d 425 (5th Cir. 1958), cert. denied 358 U. S. 884, as the Court of Appeals here recognized. *Olsen v. Smith*, 195 U. S. 332; *Parker v. Brown*, 317 U. S. 341 and *United States v. Rock Royal Co-Op.*, 307 U. S. 533, also relied on by petitioners, are not in point, since they involve efforts to invalidate *governmental* action on the basis of the Sherman Act, not to hold private conspirators responsible for their own conduct. As pointed out in *Parker v. Brown* ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U. S. at p. 351. Cf. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 298; *United States v. Silliman*, 167 F. 2d 607, 612 (3d Cir. 1948), cert. denied, 335 U. S. 825.

Accordingly, simply because petitioners included in their campaign, efforts to impose state governmental restrictions and burdens on respondents, there is no reason to depart from the established principles of anti-trust law, supported by the overwhelming weight of authority, that a conspiracy to eliminate a competitor is a violation of the Sherman Act.

## III. Application of the Sherman Act to Petitioners' Activities Does Not Violate Their Right of Free Speech.

In passing the Sherman Act, Congress "left no area of its Constitutional power unoccupied; it 'exercised all the power it possessed'." *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293. In *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502, with respect to enforcement of a state anti-trust law, this Court stated: ". . . it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade

as well as many other agreements and conspiracies deemed injurious to society." This is a sweeping statement, in nowise limited to the area of picketing as petitioners contend. It applies with even greater force where the plenary power of Congress under the commerce clause is involved, and not simply the power of a state to prohibit a local restraint. See also *Associated Press v. United States*, 326 U. S. 1.

If a public relations campaign were per se privileged, the railroads, with their tremendous financial resources, could simply purchase a concerted attack on their competitors, without any risk of incurring the penalties of the anti-trust laws, being subject solely to the laws of defamation and unfair competition.[7] Such a result would clearly frustrate the language and purpose of the Sherman Act. As this Court recognized in *American Tobacco Co. v. United States*, 328 U. S. 781, 797, with respect to the closely related field of advertising: "Such tremendous advertising . . . is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against competition."

Petitioners were held liable not for mere advocacy of abstract beliefs, but for engaging in specific action to accomplish their unlawful purpose, which the District Court found to include hundreds of overt acts (R. 106).

In view of petitioners' unlawful purpose, *Talley v. California*, 362 U. S. 60, is not in point. In *Talley* the Court invalidated a Los Angeles ordinance which prohibited distribution of anonymous handbills under all circumstances.

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7. In view of petitioners' unlawful purpose and intent, the claimed truth of a portion of their anti-truck material (as distinguished from its misrepresented source, which is admittedly false and cannot possibly be proved true), is not a defense, as it might be in an ordinary libel suit. Cf. *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457. Moreover, the material was not true. It was all presented under false colors, and included distortions of the truth. (See, e.g. ¶ 35, 36 and 37, R. 30-31, R. 105), and defamatory material, the truth of which petitioners made no attempt to prove (¶ 31, 32, R. 29).

There was no attempt to show that the particular handbill involved was distributed for an unlawful purpose, or to show that the ordinance itself was aimed at curbing any unlawful conduct.

Apart from the question of purpose, however, *Talley* does not hold that all anonymous publicity is constitutionally protected. In *Riss & Co., Inc. v. Association of American Railroads*, 1960 CCH Trade Cases ¶ 69,736 (D. D. C. 1960), a case similar in scope to this one, involving a number of the same defendants and the same sort of campaign, Judge Sirica held: "In Talley and Little Rock, the basis for the Supreme Court's ruling was that established fears of reprisal and intimidation might deter minority groups from peaceful discussion on matters of public interest. Such is not the situation here. The railroad defendants are among the largest corporations in the country. It certainly cannot be contended that the railroads of the nation will be in danger of intimidation or reprisal if their identities in connection with publicity are revealed. Plaintiff's evidence could justify a jury in finding that defendants employed hostile publicity against plaintiff by means of the 'third-party technique'. For the reasons mentioned, this Court finds that *Talley* is not controlling here."

Furthermore the facts found here make this case completely different from *Talley*: Here petitioners did not act merely under the cloak of anonymity. Here they engaged in active deception and fraud, *misrepresenting* themselves as the Grange, the Township Supervisors, automobile clubs, even the Bureau of Public Roads of the State of Ohio. When challenged petitioner Byoir's employees were instructed to say they were working, not for the railroads, but for the Grange (Pl. Ex. 109, R. 200-201, ¶ 45, R. 32-33). In the course of their campaign they violated state law (¶ 47, R. 33, R. 77), and the Federal Communications Act (R. 136-137). Their dissemination under such false colors, of misrepresented polls, surveys, studies and anti-truck publicity, which they prepared and paid for, without disclosure of

their role, in pursuance of an unlawful end has no redeeming social purpose, and is analogous, not to what was done in *Talley*, but to the practice condemned by this Court in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238, which set aside a patent on the ground that Hartford, in support of its application, filed an article ostensibly written by the president of the American Flint Glass Workers Union, whereas in fact it was prepared by Hartford. The Court said: "Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys and collaborators." 322 U. S. at pp. 246 to 247.

The use of such deceptive practices in a commercial context, was in part the basis of a finding by Judge Wyzanski that there was a violation of the Sherman Act in *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125 (D. Mass. 1959). He held that Section 2 of the Sherman Act "prohibits a person (a) who has an intent to exclude competition (b) from using not merely technical restraints of trade, but even predatory practices, unfair methods of competition, or business patterns not honestly industrial—in short what may loosely be called unfair means". 180 F. Supp. at p. 140. He went on to find that payment to eight individuals for "solicitation of outsiders to advertise in the Journal without disclosing to those outsiders that the eight were not disinterested fellow advertisers as they purported to be, but were paid employees of the Journal, was an unfair practice not honestly industrial." 180 F. Supp. at p. 141.[8]

Far from being privileged, petitioners' technique to procure legislation by misrepresentation of their true con-

8. In *Martell v. White*, 185 Mass. 255, 260, 69 N. E. 1085, 1087, 1088 (1904), the Court said: "The trader has not a free lance. He may fight, but as a soldier, not as a guerilla . . . No man can justify an interference with another man's business through fraud or misrepresentation nor by intimidation, obstruction, or molestation." See *Prosser on Torts*, pp. 1020-1029 (1941).

nection, has been held to be against public policy and illegal. Indeed, one of the principal defendants in this case, the Baltimore & Ohio Railroad, successfully contended in this Court that its own contract with a lobbyist to secure legislation without disclosing the railroad's connection with the lobbyist, was void and unenforceable because of its illegality. *Marshall v. The B. & O. Railroad Co.*, 16 Howard (57 U. S.) 314. This Court held, at page 335:

> "All persons whose interests may in any way be affected by any public or private act of the Legislature, have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity, it is due to those before whom they plead or solicit, that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practicing deceit on the Legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interest, or the arguments prompted and pressed by hope of a large contingent reward, and the agent 'stimulated to active partisanship by the strong lure of high profit.' Any attempts to deceive persons intrusted with the high functions of legislation, *by secret combinations*, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.
>
> "Legislators should act with a single eye to the true interest of the whole people, and courts of justice

can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"*Influences secretly urged under false and covert pretenses* must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts."

See also *Commissioner of Internal Revenue v. Textile Mills Securities Corp.*, 117 F. 2d 62 (3d Cir. 1940), aff'd 314 U. S. 326.

Moreover, petitioners' legislative technique was unlawful under the common law of Pennsylvania, whose legislature and governor petitioners improperly influenced by the conduct they claim is privileged. *Clippinger v. Hepbaugh*, 5 Watts & Sargent 315 (1843).[9]

Consequently, because of their unlawful purpose, carried out by unfair and deceptive means, petitioners cannot escape liability for their acts under the guise of free speech.

The injunction itself is narrow in scope. It is expressly limited to enjoining acts done pursuant to the combination or conspiracy, with the specific intent of restraining competition with respondents (R. 164-165). The activities enjoined fall into two general classes—concealment of petitioners' role in the publication of material relating to respondents and disparagement or defamation of respondents. Injunctions against restraints of trade have been upheld, even though such restraints are made effective in whole or in

9. The right to petition to the Pennsylvania legislature is personal and cannot be delegated. *Spayd v. Ringing Rock Lodge*, 270 Pa. 67 (1921). It is limited to citizens of the Commonwealth. Constitution of Pennsylvania, Article I, Sec. 20. A number of the corporate defendants, as well as the Eastern Railroad Presidents Conference, which organized the conspiracy, are not citizens of Pennsylvania and claimed they were not even within the jurisdiction of the court in Pennsylvania.

part, by acts, words, or printed matter. *Giboney v. Empire Storage & Ice Co., supra; Chamber of Commerce v. F. T. C.*, 13 F. 2d 673, 686, 696-697 (8th Cir. 1926). The principle of disclosure is also well established as an appropriate remedy for evils found to be violative of a Congressional policy —here a conspiracy in violation of the Sherman Act. See, e.g., *United States v. Harriss*, 347 U. S. 612; *Bantam Books v. F. T. C.*, 275 F. 2d 680 (2d Cir. 1960); *S. E. C. v. Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd 209 F. 2d 44 (3d Cir. 1953).

The injunction is expressly limited so as not to prohibit petitioners from seeking legislative, administrative or other governmental benefits for themselves (R. 166).

## IV. Respondents Showed the Injury Necessary to Support the Judgment for Damages and Injunctive Relief.

The issue of liability was tried first. In order to expedite commencement of that trial, and to cut short what would otherwise have been interminable discovery proceedings, respondents, other than PMTA, stipulated that their money damage claims would be limited to losses flowing from the Pennsylvania veto, which the courts below held not to be recoverable. Accordingly, as to the individual respondents, there was a finding of injury, but no substantial money damages. In such circumstances it is proper to award nominal damages. See *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 260 (2d Cir. 1908); *United Exhibitors v. Twentieth Century-Fox Film Distributing Corp.*, 31 F. Supp. 316, 317 (W. D. Pa. 1940); *Bowman v. West Disinfecting Co.*, 25 F. R. D. 280, 281 (E. D. N. Y. 1960). As said in *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 217 (1958): "Where a plaintiff has stated a good cause of action he is at least entitled to nominal damages . . ."

The right of PMTA, respondents' association, to recover damages was not questioned by petitioners until after it had been determined at the trial on the issue of liability

that PMTA had been injured in its property by the conspiracy, in being compelled to make substantial expenditures for defensive measures. As a trade association PMTA had standing to protect the interests of itself and its members. That is its business. *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459-60; *McArthur Liquors, Inc. v. Palisades Citizens Ass'n, Inc.*, 265 F. 2d 372, 374 (Ct. of App. D. C. 1959); *Archbold v. McLaughlin*, 181 F. Supp. 175, 180-181 (Dist. D. C. 1960). Cf. *American Trucking Associations v. United States, supra*. And an association may recover damages under the anti-trust laws for injuries done it. *American Cooperative Serum Association v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), cert. denied, 329 U. S. 721.

The defense that PMTA had no standing, as a trade association, to recover damages under the anti-trust laws, was not pleaded by petitioners, and accordingly was waived under Rule 12(h) of the federal rules of civil procedure. Cf. *McCandless v. Furland*, 293 U. S. 67. It was not even made the subject of any requested finding by petitioners on the subject of injury.[10] Indeed, petitioners were actively pressing throughout the trial their own similar counterclaim on behalf of the ERPC, an unincorporated association of railroad presidents (R. 51b-1).

If petitioners had properly pleaded this defense, respondents would not have stipulated away all other damages, so that it would be manifestly unfair to permit petitioners now to take advantage of a defense, never pleaded or raised at the trial, and mentioned only in passing in two sentences of a brief devoted to the merits of specific expenditures as items of damage, filed *after* their liability to PMTA for the injury they inflicted had been determined.[11] The other re-

10. Petitioners only request for a finding of fact on the subject of injury was that: "The veto of SB 615 by Governor Fine represented the sovereign act of the Commonwealth of Pennsylvania, and caused no injury to the plaintiffs" (R. 283b).

11. Petitioners' brief in the District Court, filed for the first time *after* they had been held liable to PMTA, and directed solely to the

spondents would clearly have been entitled to recover the amounts spent by them, some in the form of special payments to PMTA, for defense against the conspiracy, all of which was fully disclosed in pre-trial discovery.

As the District Court said: "In accordance with the pre-trial agreement that evidence of actual damage would be heard at a later date in the event that plaintiffs sustained their cause of action, plaintiffs limited their proofs to evidence of general injury flowing from defendants' conduct without attempting to introduce evidence of the actual damage to each individual plaintiff. If it were not for the stipulation of counsel referred to, *supra*, the Court would be prepared to grant damages to each individual plaintiff as well as the PMTA upon a hearing of evidence pointing to the actual damage suffered by them" (R. 145).

Contrary to the statements contained in petitioners' brief that the damages were computed on the basis of amounts spent by PMTA in carrying on a public relations campaign similar to the campaign conducted by petitioners, PMTA's damages were strictly limited to expenditures made solely for defense against petitioners' conspiracy, and recovery was not allowed for general public relations expenditures (R. 146).

The finding that petitioners would renew their efforts to eliminate respondents' long-haul competition, unless enjoined, which finding is not challenged, justifies injunctive relief. *Bedford Cut Stone Co. v. Journeyman Stone Cutters Ass'n*, 274 U. S. 37, 54; *Georgia v. Penna. R. R.*, 324 U. S. 439.

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issue of computation of damages, stated: ". . . it is defendants' position that PMTA, as a trade association, has no standing to maintain the action or collect damages." (Quoted in Petitioners' present brief at page 50, fn. 36). This is all they can point to in the reams of pleadings, briefs and argument in this case; where every other defense was raised, first by motions to dismiss, thereafter by answer, by argument during the trial, and in the voluminous requests for findings and conclusions which preceded the determination of liability.

## CONCLUSION.

The trial court found as a fact that petitioners engaged in a conspiracy with the object of destroying respondents as competitors, and restraining and monopolizing the long-haul freight business in northeastern United States. The Court of Appeals sustained that finding. Petitioners ignore it.

The trial court found further, as facts, that petitioners, in carrying out that conspiracy and purpose, committed many acts above and beyond seeking legislation, including defamatory statements intended to alienate respondents' customers. The Court of Appeals sustained these findings. Nevertheless petitioners persist in arguing that the means used by them were solely legislative.

The trial court found as facts that petitioners misrepresented the source of the material they disseminated, actively concealing their own part in it. Again, the Court of Appeals affirmed. Petitioners' brief reads as if they merely acted anonymously, an entirely different matter. And even then, the privilege of anonymity would not legalize what was otherwise illegal, a combination to restrain and monopolize trade. Nor are the cases apposite here in which this Court shielded individual members of oppressed minority groups voicing legitimate grievances anonymously, where otherwise they would have been intimidated in the exercise of free speech.

The defense that PMTA has no right as an association to recover damages was not timely raised, and has no merit in any event because PMTA has recovered only the damages sustained by it, not the individual truckers. The individual respondents did prove injury, but simply, by stipulation, limited their money damages.

The injunction was carefully drawn, was limited to acts done in combination and with an intent to monopolize or restrain interstate commerce, and expressly disclaims any limitation on efforts to seek legislation for the railroad

industry or without misrepresentation. The court below found as a fact that an injunction was necessary to prevent resumption of petitioners' unlawful activities in violation of the anti-trust laws.

For the foregoing reasons, the judgment of the Court of Appeals and District Court should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**October Term, 1960.**

**No. 50.**

**EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,**
*Petitioners*

*v.*

**NOERR MOTOR FREIGHT, INC., et al.,**
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals For the Third Circuit.**

## REPLY BRIEF FOR THE PETITIONERS.

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Philip Price,
Gerald E. Dwyer,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL.,

*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

## REPLY BRIEF FOR THE PETITIONERS

## ARGUMENT

### I. Respondents' Arguments Disclose That Petitioners' Activities Had No Extra-Legislative Purpose or Consequence

Respondents' brief makes no serious attempt to support the conclusion that petitioners' public relations campaign had, or was intended to have, any economic consequences apart from those caused by governmental action. The section of respondents' brief in which they discuss the alleged "impact" of the public relations campaign is of particular significance in this respect (respondents' brief, pp. 8-9). There respondents in effect concede that there is no evidence that any truckers individually, or the long-haul trucking industry as a whole, lost any customers or any traffic because of injury to good will attributable to peti-

tioners' publicity (respondents' brief, p. 9).[1] Although respondents assert that "The injury was not exclusively legislative", the assertion is unsupported by any facts or citations to the evidence (respondents' brief, p. 8). Their further assertion that the object of the campaign was to "foment resentment and hostility" (*ibid*) is also not supported by any citations to the evidence which even remotely suggest that the alleged resentment and hostility had or was intended to have any economic consequences except those flowing from governmental action.[2] Indeed, it is to be noted that both of these assertions are immediately followed in respondents' brief by references to legislative activity in New Jersey, Pennsylvania, New York, Indiana,

1. At page 9 of their brief respondents attempt to explain this failure of proof by reference to their stipulation limiting claims of respondent truckers for damages to those resulting from the Pennsylvania veto (paragraph 3, R. 47b). The fact that these respondents voluntarily waived their right to claim damages caused by alleged extra-legislative restraints could not, however, relieve them from the burden of proving the existence of such restraints if they intended to rely upon them in support of their cause of action.

The history leading to the stipulation will not permit the inference that the individual truckers could have proved, but for the stipulation, any loss of traffic or other injury apart from that flowing from governmental action. The stipulation was made after many of the respondents testified on deposition that the only economic consequences of petitioners' campaign were those caused by governmental action. (See petitioners' principal brief at page 40.) If any inference is to be drawn from the stipulation and its history, it is that respondents entered into it because they knew they had suffered no extra-legislative injury.

2. Respondents' brief implies that petitioners have not challenged the District Court's conclusion that their purpose was "to hurt the truckers in every way possible *even though they secured no legislation*" (p. 15, fn. 5). In fact, this conclusion is controverted directly and at length in petitioners' brief, where the exclusively legislative objectives of petitioners are demonstrated by detailed consideration of the evidence about the circumstances surrounding the institution of the public relations campaign, and the content of the materials disseminated in the course of that campaign (petitioners' principal brief, pp. 34-46). Respondents make no attempt to justify the quoted conclusion by a similar analysis of the evidence, or indeed by a citation of or reference to any evidence which might be thought to support it.

and Ohio, and that the only two exhibits cited by respondents in this section of their brief deal solely with petitioners' opposition to the enactment in Pennsylvania of a bill to increase the load limitations on trucks and the consequence of the veto of that bill.[3]

The articles, surveys, reports, and polls which are referred to at pages 5 to 8 of respondents' brief are discussed in petitioners' principal brief at pages 5 to 10 and 34 to 46. Even a cursory reading of the exhibits themselves shows that they dealt with petitioners' legislative arguments that heavy trucks damage existing highways and cause highway hazards and congestion and that the trucking industry does not pay its fair share of the cost of maintaining and building roads to accommodate increasingly heavy vehicles.[4]

The facts with respect to the actual content of the material that petitioners published cannot be changed or obscured by respondents' tactic of selecting colorful characterizations from internal Byoir documents which were never distributed to the public and relating these characterizations to the content of the statements which were actually used in the public relations campaign. For example, the respondents assert that "Byoir described its own anti-truck material as 'poison' to be perpetrated 'upon the defenseless public' " and cite exhibit P-148 in support of this assertion (respondents' brief, p. 6). An examination of that exhibit (R. 202) discloses that it related to a

3. P-53, R. 80-82, cited in respondents' brief at page 8, is an intra-Byoir memorandum captioned "Achievement: Defeat of 'Big Truck' Bill in Pennsylvania". P-169, which is not printed in the Transcript of Record but is at page 34a of Appellants' Appendix in No. 12,750 in the Court of Appeals, is a chart entitled "Additional Revenues To Be Gained From S615, 15 Class I Motor Carriers".

4. An example is provided by respondents' reference to Mrs. Mott's "anti-truck pamphlets" and forums (respondents' brief, p. 7). The subject matter of these pamphlets and of the forums was nothing more than a discussion of "The Effect of Taxes on the American Home" (P-16G, R. 379b) and involved a comparison of governmental policies affecting aid to and regulation of different forms of transportation, including railroads and trucks (P-12, R. 537b-543b).

contemplated article on the subject of toll roads which "really doesn't take any roundhouse swipe at the truckers" and which is not evidence, presumably because it was never published. Nor are the offensive terms with which the truckers are said to have been "labelled" ("five percenters", "evil, sinister wrongdoers", "villains", respondents' brief, pp. 7-8) to be found in the hundreds of pages of material which petitioners publicized. These terms occur only in the two intra-Byoir memoranda cited at pages 7 and 8 of respondents' brief (P-29, R. 173b and P-23, R. 187). There is no evidence that the radio and television programs proposed in P-23 were ever broadcast or that in any published material petitioners adopted the suggestion made in P-29 and capitalized on "the nefarious meaning" of "five percenters" (compare respondents' brief, pp. 4-5, with P-250, R. 590b).

Because of respondents' failure to support the conclusion that the public relations campaign had or was intended to have any consequences except those caused by valid governmental action, it has become apparent that the validity of their argument depends upon whether petitioners violated the Sherman Act by their efforts to obtain legislative action favorable to themselves and adverse to the truckers, even though those efforts had no extra-legislative consequences.

## II. Petitioners Did Not Violate the Sherman Act by Seeking Governmental Action Favorable to Their Economic Interests and Detrimental to Those of the Trucking Industry

In arguing that petitioners' efforts to obtain legislation violated the antitrust laws respondents never come to grips with the basic principle which invalidates their argument. This principle can be simply stated: because economic consequences brought about by valid governmental action are by definition not restraints or monopolizations forbidden

by the Sherman Act, concerted efforts which have no consequences apart from those brought about by valid governmental action cannot violate the statute.

To sustain the decision of the courts below, respondents have relied upon the conclusion that petitioners were motivated by an unlawful intent to restrain and to monopolize trade. There is no dispute that it was petitioners' purpose or intent to persuade governmental authorities to take action which would be beneficial to their own interests and detrimental to the interests of the truckers.[5] But to argue as respondents do that this kind of purpose is equivalent to an unlawful purpose to restrain and to monopolize trade is to assume the point in issue. If the consequence to which the purpose is addressed is itself lawful under the Sherman Act, as is the case when the consequence is to be attained solely by valid governmental action, then the purpose to achieve that consequence cannot be unlawful under that statute, for the statute by its terms has no application to concerted action not designed or tending to produce the effects which it prohibits.

Respondents' reliance upon the third-party technique is subject to a similar infirmity. The Sherman Act does not apply to all unlawful, immoral, or improper acts that may be committed jointly in the course of interstate commerce. It is directed against restraints and monopolizations of trade. The nature of activities undertaken in concert is significant under the antitrust laws only as those activities may contribute to restraints or monopolizations prohibited by the statute. The third-party technique, accordingly, can

---

5. Respondents emphasize that the District Court found that petitioners had combined and conspired with the intent to eliminate respondent trucking companies as competitors. Contrary to the suggestion made by respondents (p. 3), petitioners have never conceded the existence of any such intent to eliminate all competition by long-haul truckers (see petitioners' principal brief, pp. 34-46) and, in any event, the conclusion of the District Court has no validity apart from the evidence, which shows that, whatever may have been petitioners' purpose, they sought to accomplish it by legislative action.

have no significance in this case unless it in itself produced or helped to produce consequences prohibited by the statute. Since the third-party technique here had no consequences apart from valid governmental action, the result of which cannot violate the statute, the use of that technique cannot give rise to Sherman Act liability.[6]

## III. PMTA Is Not Entitled to Recover Damages

Respondents now contend that petitioners waived any argument that PMTA has no right to recover damages by failing to file an appropriate pleading. Actually petitioners' answers put the right of PMTA to recover damages squarely in issue and fully complied with every requirement of the Rules of Civil Procedure. From the ambiguous generalities in respondents' complaint, it was unclear whether PMTA was claiming damages for injury to its own business or in a representative capacity.[7] The answers filed by petitioners fairly met both claims. The

6. The point is illustrated by *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 135 (D. Mass. 1959), cited in respondents' brief. There one of the means involved (solicitation of advertising by persons whose affiliations were not disclosed) was directly related to the achievement of monopoly power, unsanctioned by governmental action—a result which section 2 of the Sherman Act condemns if obtained by methods "not honestly industrial". The decision has no relevance to the problem here involved where the results were to be achieved by governmental action.

7. Respondents' complaint identified respondents as representatives of a class (paragraph 1, R. 1-2) and claimed only that they had been damaged "by increased expense of operation, loss of accounts, and loss of profits and prospective profits" (paragraph 28, R. 10-11). The respondents themselves pleaded their inability to specify their damages with exactness or precision and contented themselves with a claim of damage to the entire class which they purported to represent (paragraph 30, R. 11).

Even now, after almost 8 years, a trial, and an appeal, PMTA's position is still ambiguously stated. At one point in their brief respondents assert (page 25): "As a trade association PMTA has standing to protect the interests of itself and its members". At another point respondents assert (page 27): "PMTA has recovered only the damages sustained by it, not the individual truckers".

general allegations of a right to recover damages were expressly denied and a separate defense specifically stated that the respondents, who of course included PMTA, had no right to assert any representative claim. (See, e.g., answer of ERPC, paragraphs 28, 30, and 36, R. 6b, 7b, and answer of The Pennsylvania Railroad Company, paragraphs 28, 30, and 32, R. 15-16.) No additional pleading was either required or, for that matter, appropriate.

In effect, respondents now argue that PMTA should be awarded damages in a representative capacity because the trucker respondents will not otherwise be able to recover sums they may have contributed to PMTA to defend themselves against petitioners' public relations campaign. Months before PMTA particularized its damage claim, the trucker respondents voluntarily entered into a stipulation which prevents them from claiming such sums as items of damage for themselves.[8] To permit PMTA to recover as their representative would thus in effect be to give the trucker respondents money damages which they have expressly disclaimed. The decisions cited in petitioners' brief in chief (pages 49-50) establish that a trade association cannot recover money damages for injury to property of its members but can recover such damages only for injury to its own business or property. The decisions cited by respondents in their brief in support of the proposition that a trade association has standing to protect its members' interests (page 25) do not arise under the antitrust laws, do not relate to money damages and are therefore not in point. Finally, any notion that the sum awarded PMTA represents amounts contributed to it by the trucker respondents is contradicted by the fact that the damages awarded to PMTA do not coincide with the trucker respondents' contributions to PMTA. Not all

8. The form of this provision of the stipulation was settled by April 27, 1956, and approved by the District Court on May 17, 1956. The PMTA's answers to interrogatories, which for the first time spelled out its damage claim, were filed September 19, 1956, only 11 days before the trial began.

the trucker respondents were members of PMTA during the period involved in this case and only a few of PMTA's thousands of members are parties in this case.

Nor can the award of damages be justified on the ground that it compensates for injury inflicted upon the business and property of PMTA itself. The opinions of the courts below rest on the premise that the activities of the petitioners were intended to injure and did injure the business of long-haul truckers. Admittedly PMTA is not itself engaged in the long-haul trucking business. It will not suffice to assert, as respondents do, that the "business" of PMTA is to protect the interest of its members. This is merely another way of asserting that PMTA is entitled to recover damages for injury to the business of its members.

PMTA is a nonprofit organization. Unlike the commercial enterprise whose injury by reason of an antitrust violation can be measured in loss of trade or decreased profits, PMTA claims "injury" here only because it made certain expenditures. There is not, nor could there be, any showing that these expenditures were made to mitigate damages which PMTA itself would otherwise have suffered. The expenditures are relied on both to represent the fact of and to measure the degree of "injury", and if they had not been made PMTA would, by hypothesis, have suffered no injury. Nor can it be argued that PMTA's expenditures are a proper element of damages because they were made in an endeavor to mitigate injury to the trucker respondents. There is no principle of antitrust law which would give PMTA the right to recover, on its own behalf, expenditures made to mitigate the damages of others.

## CONCLUSION

Petitioners respectfully submit that respondents have advanced no reason in their brief why the judgment of the Court of Appeals should not be reversed and the case remanded with instruction to render judgment for petitioners.

**Respectfully submitted,**

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**October 24, 1960.**

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IN THE

# Supreme Court of the United States

**October Term, 1960.**

**No. 50.**

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,

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*v.*

NOERR MOTOR FREIGHT, INC., et al.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

## SUPPLEMENTAL BRIEF FOR RESPONDENTS FILED PURSUANT TO RULE 41(5).

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*Petitioners,*

*v.*

NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

## SUPPLEMENTAL BRIEF FOR RESPONDENTS FILED PURSUANT TO RULE 41(5).

It has been argued by petitioners that the sovereign power of the state to legislate, and their right to seek legislation, insulates them completely from liability under the antitrust laws, despite their intent, in combination, to achieve a monopoly. Of course, as stated in our brief, petitioners' argument ignores the fact that the legislative activity was only one of many means used by petitioners to achieve the monopoly.

Moreover, this argument parallels that of the City of Tuskegee, that the sovereign state legislative control over municipal boundaries and election districting is immune from constitutional and judicial control, an argument which was rejected this past Monday, November 14, 1960, in *Gomillion, et al. v. Lightfoot, et al.*, October Term, 1960, No. 32, 29 L. W. 4024.

In that case, this Court, in an opinion by Mr. Justice Frankfurter, stated: ". . . 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U. S. 324, 357' . . ." The *Reading* case cited was an antitrust case involving railroads, and this principle is illustrated by many other antitrust decisions including: *Northern Securities Co. v. United States*, 193 U. S. 197, 343-50; *United States v. Sisal Sales Corporation*, 274 U. S. 278; *United States of America v. Borden Co., et al.*, 308 U. S. 188, 204-5; *Union Pacific Railroad Company v. United States*, 313 U. S. 450, 465-7; *United States v. South-Eastern Underwriters Assn., et al.*, 322 U. S. 533, 553-62; *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 454-62; *United States v. Radio Corp. of America*, 358 U. S. 334, 346-7, 353; See also Brief for Respondents, at pp. 16-18.

And the reason for this rule is even stronger here than in *Gomillion* since respondents here do not seek to invalidate the state legislation,[1] but only to recover from and enjoin the private parties who sought to procure it as one part of their conspiracy to monopolize.

The Court in the *Gomillion* case set forth further the principle which guides the judicial consideration of such controversies: "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. . . ."

The Court's admonition, that "sophisticated as well as simple-minded modes of discrimination" are forbidden, applies equally to sophisticated conspiracies to monopolize, as the trial court concluded with regard to the conspiracy here (R. 48, 110).

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1. See *Bibb v. Navajo Freight Lines*, 359 U. S. 520, 526-7, 529-30.

The Court also noted that the Tuskegee argument "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions". Here, too, the argument of petitioners would sanction the achievement of any monopoly whatsoever so long as it was cloaked in the garb of legislation. But, as the cases cited above show, the Court has again and again declared the achievement of a monopolistic purpose through governmental action does not insulate the private parties who have sought such action from responsibility for violation of the antitrust laws.

Respectfully submitted,

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## RESPONDENTS' PETITION FOR REHEARING.

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NOERR MOTOR FREIGHT, INC., ET AL.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## PETITION FOR REHEARING.

Respondents, Noerr Motor Freight, Inc., et al., respectfully petition the Court for the opportunity to reargue their cause in No. 50, October Term, 1960, in which this Court on February 20, 1961 reversed the judgments of the courts below insofar as they had held Petitioners liable for violation of the Sherman Act.[1]

1. This Court's judgment should, in any event, be modified, since it includes reversal of the judgment of the District Court against the New York, Ontario and Western R. R., a defendant which took no appeal.

## I.

### Summary of Grounds for Granting the Petition.

Respondents respectfully submit that:

(1) This Court actually here decided a case which was not before it, and (2) even if the supposititious case which this Court purported to decide had been before it, the decision would still have been incorrect.

This Court assumed that the effort of Petitioners to obtain legislation was the **primary** purpose of their conspiracy, whereas actually the District Court specifically found as a fact, and the Court of Appeals sustained the finding, that the **primary** purpose of petitioners' conspiracy was to destroy Respondents' good will with their shippers and suppliers, and the **secondary** purpose was to obtain legislation with the entire conspiracy being artfully concealed as a legislative drive.[2]

Second, this Court decided that "every combination" now means "every combination except", in plain contradiction (a) to the unequivocal language of the Sherman Act itself; (b) to the Court's construction of that language, through Mr. Justice Black in *United States v. Southeastern Underwriters Association*, 322 U. S. 533, where he wrote,

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2. The District Court found: "The instrumentality or means by which this object was to be achieved was *primarily* by a campaign designed to destroy the good will of the truckers, and, secondly, by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision" (R. 106). The Court further found:

> "The distinct impression of the Court, sitting as a jury, in drawing the inferences from the evidence presented, is that this was a carefully calculated plan under the guidance of competent legal counsel which sought to choose a means of injuring and, if possible, destroying interstate truck competition that would afford the greatest amount of constitutional protection and thereby seek to render it immune from the coverage of the antitrust laws. A further inference to be drawn is that the plan was to be cast in the *guise* of a gigantic legislative campaign in order to attempt to surround it with the protections of the right to assemble, the right to petition the legislature and freedom of speech." (R. 110)

inter alia: "Language more comprehensive is difficult to conceive"; and (c) with particular respect to procuring governmental action, to the decisions in *United States v. Sisal Sales Corp.*, 274 U. S. 268 and *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, relied upon by the courts below and cited to this Court, but nowhere referred to in its Opinion.

Respondents, like the Court, are aware that many railroads are currently subject to financial adversity, but that is no reason for exempting them from the antitrust laws, and as the trial court pointed out, their troubles are largely of their own making because of their refusal to give shippers the services they want and need.

We are also mindful of the fact that the decision here was by a unanimous Court. However, rehearings are not confined to 5 to 4 decisions,[3] and we respectfully suggest that an opinion of a unanimous Court may receive less critical analysis within the Court itself than one which enjoys the consideration of a dissenting Justice before its filing.

Respondents accordingly seek a rehearing on each of the following grounds:

1. the Court assumes facts, necessary to sustain its decision, which are directly contrary to the unchallenged facts as found by the District Court;[4]

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3. See, e.g., *Flora v. United States*, 362 U. S. 145 (original decision 8 to 1).

4. No challenge to such findings was made by Petitioners in their Questions Presented. Issues which might have been raised by a request that the fact findings be reversed or modified were therefore not before the Court. *Irvine v. California*, 347 U. S. 128, 129; *Local 1976 v. N. L. R. B.*, 357 U. S. 93, 96. Because of Petitioners' failure to challenge the findings of fact, Respondents did not print all parts of the record which would support the findings made by the District Court below, findings which are now ignored or reinterpreted by this Court. (See Slip Sheet Opinion, pp. 15-16.) The findings were all affirmed by the Court of Appeals as "soundly based on substantial evidence" (R. 216).

2. the Court's decision is in irreconcilable conflict with certain of its prior decisions, some expressly relied on by the courts below, but not even referred to by this Court in its opinion;

3. the Court's decision and the broad language of its opinion have far-reaching consequences with respect to construction of the Sherman Act, imposing serious limitations on the previously plenary coverage of the Act, which heretofore has been held subject to limitation only by specific Congressionally enacted exemptions;

4. the Court narrowed the construction of the Sherman Act, out of an expressed concern for possible constitutional issues, which a broader construction might raise, although petitioners had not validly raised any constitutional issues in their questions presented, so that as to them the issues were not before the Court.[5]

## II.

**To Arrive at Its Decision, the Court Was Compelled to Disregard the Fundamental Findings of Fact of the District Court Affirmed by the Court of Appeals, and Not Attacked by the Petitioners in Their Questions Presented.**

A District Judge might justifiably be disturbed by the reversal of his decision, not because of what this Court now declares the law to be, but simply because the District Judge while recognizing every case cited by this Court, deemed them inapplicable because of certain findings of fact made after hearing the evidence. This Court now reverses by ignoring the findings of fact actually made by the District Judge. These findings of fact were affirmed by the Court

5. *Irvine v. California*, 347 U. S. 128, 129.

of Appeals and are not even questioned by the Petitioners in their Questions Presented. Petitioners did not even attempt the "almost insurmountable burden" of demonstrating that these findings were "clearly erroneous". *International Boxing Club of New York v. United States*, 358 U. S. 242, 252. Respondents submit that this Court completely erred in its Footnote 18 in which it states:

> "There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement."

Since Petitioners did not attack the findings of fact, Respondents did not see fit to print all of the evidence in the record which supports any particular finding. In other words, this Court has before it substantially only the record as printed by the railroads.

This Court treated the problem before it as one where the primary purpose of the joint action was to seek repressive legislation, characterizing as merely "incidental" the District Court's finding that the purpose of the railroads was "more than merely an attempt to pass legislation. It was the purpose and intention to hurt the truckers in every way possible *even though they secured no legislation.*" (Slip Sheet Opinion pp. 15-16.)

To treat the District Court's findings in the above manner is not only misleading, but diametrically opposed to what that court found. In effect, it permits Petitioners to engage in "the practice of smuggling additional questions" into the case after the grant of certiorari, since Petitioners requested no such modification of the findings. This Court expressly disapproved such practice in *Irvine v. California*, 347 U. S. 128, 129. The District Court actually found that the purpose of the conspiracy was to drive the Respondents out of the long-haul business, and the *primary intent* was to destroy the good will of the truckers with its customers, thereby driving away some of its customers, even though no legislation was ever secured. The District Court stated

that "restated in extremely simple form I have found the following:

> "1. That the defendants combined in and about May 19, 1949 with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade.
>
> "2. That they were joined in this combination by the Byoir organization on or about August 15, 1949 for the same purpose and with the same intent and for a handsome remuneration.
>
> "3. The instrumentality or means by which this object was to be achieved was *primarily* by a campaign designed to destroy the good will of the truckers, and, *secondly,* by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision." (This finding is exactly opposite to what this Court now states was the "primary" purpose of the conspiracy.)
>
> "4. Hundreds of overt acts in furtherance of this plan were carried out throughout the country, and all in furtherance of the same object and design." (R. 106)

Earlier in its opinion, the court below had stated:

> "It is clear from the above, regardless of the success or failure of legislation proposed by the railroads unfavorable to the truckers, that a real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." (R. 104)

The District Court also found that Petitioners' "immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and *in such a manner as to interfere with business relations between shippers and truckers.*" (R. 101)

In fact, the District Court went so far as to state specifically that the case which this Court now purports to decide was not the case which was before the District Judge, based upon the evidence. The District Court stated:

> "Counsel for all defendants have argued strenuously that since everything done was geared to ultimate legislation, then anything done to accomplish that end was within the protection of the 1st Amendment to the Constitution of the United States and without the orbit of the Sherman and Clayton Antitrust statutes. But this was more than merely an attempt to obtain legislation. It was the purpose (fol. 107) and intent of Messrs. Deegan, Littlefield and Mackie on the one side, and Byoir on the other, to hurt the truckers in every way possible even though they secured no legislation; it was their purpose to restrict the activities of the truckers in the long-haul industry to the greatest extent possible, and finally, if possible, to drive them out of that segment of the entire transportation industry. This feature of the action, which must always be carried in mind and represents the considered finding of the Court in this case, will be discussed at greater length in the legal discussion to follow." (R. 88)

Much of the third party material which the Petitioners caused to be disseminated had nothing whatsoever to do with truck damage to roads or legislation affecting weight limits or road taxes, but instead was devoted to such themes as trucks being subject to frequent accidents, which naturally damaged their cargo and the viciousness and dishonesty of truckers (R. 84-88).

The campaign was directed toward such organizations of *businessmen* as the Rotary, Lions and Kiwanis, among whom were a great many customers of the Respondents.

The trial lasted several months and involved thousands of pages of oral testimony, much of which is not now before the Court because the findings of fact were not challenged

by the Questions Presented. Credibility was an important issue in many instances, a large part of Respondents' case being put in by witnesses associated with the Petitioners and called for cross-examination. The trial court observed these witnesses and was certainly in a much better position than this Court, with only a partial record before it, to determine what was Petitioners' primary purpose and what was their secondary purpose. That is a plain issue of fact involving very little, if anything, by way of legal conclusion, and certainly is much less subject to appellate review than the issue as to what constituted the separate market in the *International Boxing Club* case, *supra*.

Respondents submit that they should have the opportunity to argue this case based upon the findings as actually made by the District Court, not on this Court's erroneous characterization of those findings as "incidental". (Slip Sheet Opinion, p. 16.)

## III.

### This Court's Decision Is Contrary to, and Overrules, Sub Silentio, Prior Decisions of This Court Relied Upon by the Courts Below.

A primary basis for the Court's decision here is its statement that its previous decisions had held:

> ". . . that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branches of government so long as the law itself does not violate some provision of the Constitution.
>
> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating

together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (Slip Sheet Opinion, pp. 8, 9.)

For this novel proposition this Court cites only *United States v. Rock Royal Co-op*, 307 U. S. 533, and *Parker v. Brown*, 317 U. S. 341. But these cases hel[d], and held *only*, that particular governmental action was valid even though it could be shown that it was brought about as the result of an unlawful combination of competitors. There is not one word in the opinions in those cases which deals with the situation here present, to wit, whether the competitors who obtained such governmental action could be held liable by an injured party under the Sherman Act. The courts below clearly recognized the holdings in those two cases, cited as authority by this Court,[6] but then proceeded to deal with the actual and different situation in this case, relying upon

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6. The District Judge said: "This Court is in complete accord with the principle set forth in those cases. The plaintiffs do not seek to invalidate any legislation nor do they seek to inquire into Governor Fine's motive in vetoing S. B. 615." The District Judge also stated:

"The defendants argue that since they were merely seeking to impose legislation upon the truckers any monopoly that they have obtained by virtue of such legislation would be a legally protected one. In this argument they ignore the fact that their campaign was far more than a mere legislative scheme. They further ignore the principle that legal means may not be used to accomplish an illegal objective. This Court agrees that a legislature has the right and power to legally create a monopoly for the general welfare of the people, and that the recipient of such a (fol. 150) monopoly is legally protected, if his conduct is otherwise legal, as are the responsible government officials carrying out the will of the legislature. Further, the beneficiaries of such a monopoly, within permissible limits, may enforce these rights in the courts. But it is not a mere legislatively-created monopoly that is under attack in this case. It is a conspiracy to destroy a competitor; a conspiracy to destroy his good will; the distortion of facts to further that end; the presentation of distorted and false information to the public and to public officials that

other opinions of the Court which have sustained liability under the Sherman Act although the validity of the governmental action itself was not in question. Unfortunately, these cases are not even cited in this Court's opinion.

The following cases decided by this Court specifically hold that restrictive governmental action, legislative or executive, induced by the joint action of competitors, does not immunize such competitors from liability under the Sherman Act. These cases are:

1. *United States v. Sisal Sales Corp.*, 274 U. S. 268. In that case, the defendants were held to have violated the Sherman Act by means of a monopoly and restraint based substantially on Mexican legislation which they procured and which included:

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are under attack, as well as the fomentation of government restrictions." (R. 127-8)

And he held:

"The plaintiffs have not here limited themselves in their proofs to those injuries proximately resulting from the veto of S. B. 615 in seeking to sustain their cause of action. Their allegations and proofs go far beyond anything so narrow as that executive act. The effect of the campaign to destroy the truckers' good will had a very substantial and direct effect upon interstate commerce and hence this case is beyond the law of the *Okefenokee* case insofar as plaintiffs' ability to sustain their cause of action is concerned. Defendants have earnestly striven to convince the Court, sitting as a jury, that the plaintiffs' entire case (not simply their right to compensatory damages) is limited to complaints of the defendants' attempts to seek legislation and the loss flowing from such. Hence, they seek to bring themselves within the purview of the *Okefenokee* case. In that respect they have failed to convince the Court.

"Further, the truckers do not contend that they have an unrestricted legal right to use the highways; nor are they attempting to alter any decision of any responsible public official. But they did have a legal right to be in the transportation business. Unlike *Okefenokee*, and like *Angle*, the defendants conspired to destroy the good will of their chief competitor in furtherance of their illegal objective, independent of any legislative or executive act . . ." (R. 129-130)

(1) an edict authorizing the defendants' activities;

(2) discriminatory taxes on sisal favoring the defendants; and

(3) a statute restricting sisal production and thus maintaining the value of the defendants' reserves.

The defendants there argued that a restraint achieved through legislation could not constitute a violation of the Sherman Act, on the authority of *American Banana Co. v. United Fruit Co.*, 213 U. S. 327. This Court in *Sisal* rejected the argument, declaring that:

> "'True, the conspirators were aided by discriminatory legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.'" 284 U. S. at p. 276.

About *Sisal*, the District Court in this case stated:

> "In the *Sisal* case the court granted an injunction against several individuals and corporations who by virtue of a conspiracy had obtained control of the importation and sale of (fol. 154) sisal from Mexico and a complete monopoly of the internal and external trade and commerce in that product. Although sisal was a product of Mexico, a foreign country, and the monopoly was effectuated by securing the passage of discriminatory legislation in that country, the court held that the activities in question were in violation of the Sherman Antitrust Act and the Wilson Tariff Act and that the case was not controlled by the *Banana* decision, pointing to the above-referred-to narrow application of the *Banana* doctrine." (R. 131)

Yet now this Court's opinion does not even cite the *Sisal* case.

Perhaps there is a rational distinction between foreign legislation and legislation of a state. As Respondents see the distinction, there would be less reason to apply the Sherman Act to one who achieved a monopoly by foreign legislation than by state legislation, in view of the supremacy of the commerce clause. But at least, Respondents submit, the Court should have considered the case in its opinion, particularly since the courts below found it persuasive and justifiably relied upon it as setting forth the law (R. 130-1).[7]

2. *Georgia v. Pennsylvania Railroad Company*, 324 U. S. 439. There the railroads jointly determined what rates should be charged southern shippers and thereafter went to the Interstate Commerce Commission for approval

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7. The Justice Department itself has always taken the position that a combination to eliminate competition or impose a restraint is not saved from the prohibition of the Act to the extent that it employs legislative devices. *United States v. Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945).

In *United States v. Maryland & Virginia Milk Producers Association, Inc.*, only a few months ago, on remand after the decision of this Court in favor of the government, 362 U. S. 458, a consent decree was entered which enjoined the defendant, *inter alia*, from "engaging or employing any person to present as his own or as any person's other than defendant's the views of defendant concerning the enactment, amendment, repeal or rescission of any legislation or regulation affecting defendant, or from remunerating any person who, without disclosing either that he is presenting the views of defendant or that he is being remunerated by defendant, makes representations to a legislative or regulatory body or who at the express or implied direction or request of defendant makes representations to any organization or association without making either such disclosure; . . ." 1960 CCH Trade Cases ¶ 69,860, § IV(G), (Dist. D. C. 1960).

The record in that case before this Court shows that the complaint in paragraph 22(i) alleged that: "In effectuating the offenses hereinbefore charged, the defendant has: . . . (1) Sought and urged action by governmental agencies for the purpose of excluding or eliminating competition." (Transcript of Record, Vol. 1, pp. 6-7, 17-18; and see also pp. 55-56 for the statement of particulars filed by the Government).

of such rates. Despite this governmental action by a federal body this Court nevertheless held that such joint activity violated the Sherman Act. There the Court said: ". . . under the Anti-trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal . . . The fact that these rates have been approved by the Commission would not, it seems, bar proceedings by the Government." p. 458. And, as discussed below, the railroads were subsequently relieved of the Sherman Act's prohibition of their combination to procure government action only by a Congressional enactment, not by judicial decision, nor by state statute or executive action.

3. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384. In that case (not cited by the courts below) the statutes of Louisiana expressly and clearly provided that an owner of a trademark could fix the minimum retail price of his goods and that this provision could be enforced in Louisiana against one who had not signed the agreement. This Court there recognized that the state statute specifically required the non-signer to observe the price fixed by the trademark owner.[8] This Court held, nevertheless, that such agreements violated the Sherman Act since the Miller-Tydings Act at that time[9] carved out an exemption under the Sherman Act only as to those dealers who actually signed the contract with the owner of the trademark.

In the *Schwegmann Bros.* case, this Court stated with respect to the argument that the state statute conferred an immunity:

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8. The state price fixing statute was clearly valid state legislation and would be enforceable against anyone not engaged in interstate commerce. *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183; *Pep Boys, Manny, Moe & Jack, Inc. v. Pyroil Sales Co.*, 299 U. S. 198.

9. It took subsequent legislation by Congress, not the abortive state legislation, to remove the restrictions on non-signers from the coverage of the Sherman Act.

"The argument is phrased as follows: the present action is outlawed by the Sherman Act—the Miller-Tydings Act apart—only if it is a contract, combination, or conspiracy in restraint of trade. But if a contract or agreement is the vice, then by the terms of the Miller-Tydings Act that contract or agreement is immunized, provided it is immunized by state law. The same is true if the vice is a conspiracy, since a conspiracy presupposes an agreement. That was in essence the view of the Court of Appeals, which affirmed by a divided vote a judgment of a district court enjoining petitioner from price cutting. 184 F. 2d 11.

"The argument at first blush has appeal. But we think it offends the statutory scheme.

"We note to begin with that there are critical differences between Louisiana's law and the Miller-Tydings Act. The latter exempts only 'contracts or agreements prescribing minimum prices for the resale.' On the other hand, the Louisiana law sanctions the fixing of maximum as well as minimum prices, for it exempts any provision that the buyer will not resell 'at the price stipulated by the vendor.' We start then with a federal act which does not, as respondents suggest, turn over to the states the handling of the whole problem of resale price maintenance on this type of commodity. What is granted is a limited immunity —a limitation that is further emphasized by the inclusion in the state law and the exclusion from the federal law of the nonsigner provision. The omission of the nonsigner provision from the federal law is fatal to respondents' position unless we are to perform a distinct legislative function by reading into the Act a provision that was meticulously omitted from it.

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> "It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See Parker v. Brown, 317 U. S. 341, 350, 87 L. ed. 315, 325, 63 S. Ct. 307." (341 U. S. at pp. 387-389)

Under the principles of these cases, the states themselves cannot by legislation immunize Petitioners from the application of the Sherman Act, so as to permit them to obtain a monopoly of interstate freight, so that Petitioners can certainly enjoy no immunity in seeking to procure such legislation for that unlawful purpose.[10]

Respondents submit that this Court was misled by equating the question whether the legislation procured is valid (*Parker v. Brown* and *United States v. Rock Royal Co-op, supra*) with the question whether the private persons who wrongfully procure such valid legislation may be held liable in damages. This distinction was clearly made in this Court's decision in *Angle v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, 151 U. S. 1, another case relied upon by the District Court (R. 123), but not mentioned or dealt with in this Court's opinion. In that case defendant was held subject to tort liability for legislation procured by its deception, to the injury of another, one of the precise issues in this case. The Court stated, at pp. 18-25:

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10. Petitioners' counsel, Mr. Cox, in his oral argument unabashedly admitted that: ". . . what they were doing was trying to get the state legislatures to pass laws that would admittedly limit, *cripple* the competitive power of the trucks." (Transcript of Oral Argument, p. 75.)

". . . The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. . . .

". . . The wrong was not one done by the state or in the act of the legislature in taking away the land grant, but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. . . .

". . . Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representation of the Omaha Company, the legislature resumed its grant and made a re-grant to the Omaha Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives, or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. . . ."

## IV.

**The Decision of the Court Limits Judicially the Provision of the Sherman Act That "Every . . . Conspiracy or Combination in Restraint of Trade . . ." Is Unlawful, Whereas All Prior Limitations of That Plenary Language, Apart From the Rule of Reason, Have Been by Express Congressional Enactment.**

This Court, in its opinion, states:

". . . the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." (Slip Sheet Opinion, p. 9.)

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". . . we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." (Opinion, p. 11)

Apart from the Rule of Reason,[11] this is the first time that this Court has given a restrictive meaning to the statutory language, making unlawful "*every* . . . com-

11. It has recently been held that a conspiracy to eliminate a competitor, employing as its means, inter alia, disparagement of the competitor, is a per se violation of the Sherman Act. *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir. 1960). And even the Rule of Reason cases held the specific combinations there before the court to be in violation of the Sherman Act. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106.

bination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." 15 U. S. C. § 1. In *United States v. Southeastern Underwriters' Association,* 322 U. S. 533, 553-9, this statutory language was construed by Mr. Justice Black as follows:

> "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.
>
> "A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. 'Trusts' and 'monopolies' were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them. The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or wanted. So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished.
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> • • •
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> ". . . And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. Cf. Helvering v. Griffiths, 318 U. S. 371, 87 L. ed. 843, 63 S. Ct. 636; Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. ed. 184, 62 S. Ct. 221. We have been shown not one piece of reliable

evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges admits of little, if any, doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy. Nor is it sufficient to justify our reading into the Act an exemption for insurance that the Congress of 1890 may have known that states already were regulating the insurance business. **The Congress of 1890 also knew that railroads were subject to regulation not only by states but by the federal government itself, but this fact has been held insufficient to bring to the railroad companies the interpretative exemption from the Sherman Act they have sought.** United States v. Trans-Missouri Freight Assoc., 166 U. S. 290, 314, 315, 320-325, 41 L. ed. 1007, 1018, 1019, 1020-1022, 17 S. Ct. 540." (Emphasis added.)

But this Court now indicates that the language is to be much more restrictive and is to be narrowly limited. At p. 9 of the Slip Sheet Opinion, the word "every", which has heretofore been held a key word in the statute, is omitted, and it is said that:

". . . the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-

division agreements, and other similar arrangements." [12]

Prior limitations of the statute's all inclusive language have, apart from the Rule of Reason, had to be brought about by express Congressional enactment. Such limitations have included:

1. The "Miller-Tydings Act", Act of Congress of August 17, 1937, c. 690, 50 Stat. 693, 15 U. S. C. § 1, exempting certain resale pricing agreements.

2. The Clayton Act exemption for legitimate activities of labor organizations. Act of Congress of October 15, 1914, c. 323, 38 Stat. § 731, 15 U. S. C. § 17.

3. The "Capper-Volstead Act", Act of February 18, 1922, c. 57, 42 Stat. 388, 7 U. S. C. § 291, authorizing certain activities of agricultural producer associations.

4. The "McCarran Act", Act of Congress of March 9, 1945, c. 20, 59 Stat. 33, 15 U. S. C., § 1011, exempting insurance business, insofar as regulated by the states.

5. The "Bulwinkle Act", Act of June 17, 1948, c. 491, 62 Stat. 472, 49 U. S. C. § 5(b), exempting certain rate fixing activities of carriers, including the railroads.

6. The "McGuire Act", Act of July 14, 1952, c. 745, 66 Stat. 631, 15 U. S. C. § 45, exempting certain resale pricing agreements.[13]

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12. The combination here employed means no more unusual than those whereby competitors, to restrain a competitor, seek governmental action by enforcing their patent rights in court proceedings, as part of a scheme to eliminate competition. See, e.g., *United States v. Krasnov*, 355 U. S. 5, aff'g 143 F. Supp. 184 (E. D. Pa. 1956).

13. For other Congressionally enacted exemptions see footnote 14, *infra*. See also "The Antitrust Laws, A Basis for Economic Freedom," Staff Report to the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 85th Cong. 2d Sess., Pursuant to H. Res. 107, January 1, 1959, and particularly the statutes set forth in Part III thereof, under the heading "Exception and Exemption."

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, the State of Louisiana clearly attempted to give the holder of a trademark a monopoly even with respect to the non-signer. This Court held that the state law could make legal what is otherwise illegal under the Sherman Act only to the extent that *federal* law amended the Sherman Act.

Congress has enacted no amendment creating an exemption for efforts to secure a monopoly or impose a restraint in interstate commerce, to "cripple" an interstate competitor, as Mr. Cox said (Transcript of Oral Argument, p. 75), through non-federal legislative or executive action, though the *Sisal* case, holding that such activities do fall within the prohibitions of the Sherman Act, has been on the books since 1927, since which time a number of other exemptions have been enacted.[14]

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14. The Court pointed out in *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 227 footnote 60, that: ". . . the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. Under the N. I. R. A. this could be done through the code machinery with the approval of the President as provided in §§ 3(a) and 5, *supra*, note 18. Under § 407(8) of the Transportation Act of [February 28] 1920 (41 Stat. at L. 456, 482, chap. 91, 49 USCA § 5(8)) carriers, including certain express companies, which were consolidated pursuant to any order of the Interstate Commerce Commission were relieved from the operation of the Anti-trust laws. And see the Maloney Act (§ 15A of the Securities Exchange Act of 1934 [as amended, June 25, 1938] 52 Stat. at L. 1070, chap. 677, 15 USCA §§ 780-783) providing for the formation of associations of brokers and dealers with the approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations; and the Bituminous Coal Act of [April 26] 1937 (50 Stat. at L. 72, chap. 127, 15 USCA § 828), especially §§ 4 and 12—particularly as they relate to the fixing of minimum and maximum prices by the Bituminous Coal Commission . . ."

## V.

**There Is No Genuine Constitutional Issue in This Case.**

In support of its decision, the Court states that:

> ". . . Such a construction of the Sherman Act (holding petitioners liable for their conduct) would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." (Slip Sheet Opinion p. 11)

Apart from the fact that other First Amendment guarantees [15] have been held by the Court not to limit the power to prohibit combinations in restraint of trade, *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, nor, by like token, to limit liability in damages for libelous utterances, see *Roth v. United States*, 354 U. S. 476, 483, the issue in the present case is academic. Petitioners in their Questions Presented raised no constitutional issues (See Transcript of Oral Argument, pp. 17-18). The Court should, therefore, be loath to construe the Act narrowly, out of concern for possible constitutional problems, in favor of parties who have waived the issue, and as to whom, therefore, it is moot.

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15. The Court's statement that the Sherman Act was not meant to cover political activity (Slip Sheet Opinion p. 10) ignores the historical connection between monopoly and political power. An historian of the WHEEL, one of the strongest of the farmers' organizations in the '80's, had this to say about its origin: "The question has often been asked, what gave rise to the Wheel? This question is as easily answered as asked, Monopoly! . . . Monopoly aspires to make the people its servants, *politically*, financially and socially, and demands that we offer on its golden altar all that we are and have, souls, bodies, lives, liberty, and common country, unreservedly and without complaint." Morgan, *History of the Wheel and Alliance* (Fort Scott, Kan. 1889), p. 56. Quoted by this Court in *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 554, footnote 39 (Opinion by Mr. Justice Black).

## CONCLUSION.

Petitioners freely conceded that their activities were intended to cripple Respondents' competition. They also conceded that they sought to obtain their objective by a combination and that such objective would affect commerce among the several states.

The Court has thus by its decision, holding Petitioners' activities immune from the antitrust laws, seriously limited the scope of the Sherman Act, despite its plenary language that "*every* combination . . . in restraint of trade or commerce among the several states . . ." is illegal. Prior limitations or exemptions have been through Congressional enactment. The limitation now imposed by the Court, has no statutory sanction, and conflicts directly with the prior decision of the Court in the *Sisal* case, as well as with the principles of such cases as *Schwegmann*, and *Georgia v. Penna. R. R.* But what is even more basic and affects the very heart of the appellate and reviewing process, the Court did not have to decide that issue, if it had only given due respect to the fundamental findings of fact of the District Court, not questioned by Petitioners. Instead those findings have been ignored, and the Court's decision based on completely different facts from those found.

Respondents accordingly request the right to reargue these issues, because of their overriding importance in the construction of the Sherman Act.

Because of the grave adverse affect of the Court's construction of the Sherman Act upon the enforcement of that Act by the Department of Justice, and because the Department of Justice itself has taken a different view with regard to the scope of the Act, as pointed out above (p. 12, fn. 7), it is respectfully suggested that it would be appropriate for the Court to request the views of the Attorney General on re-hearing, as the Court has done from time to time in recent years where litigation between private parties involved issues of public importance.

The Court has also indicated that its present restricted construction of the Act arises, in part, out of concern lest a broader construction be unconstitutional. In situations where the constitutionality of an Act of Congress affecting the public interest is drawn in question, the Act of Congress of June 25, 1948, c. 646, 62 Stat. 971, 15 U. S. C. § 2403 provides:

> "In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. . . ."

Respondents respectfully request such certification in this case.

Respectfully submitted,

AARON M. FINE,
HAROLD E. KOHN,
*Attorneys for Respondents.*

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**Certificate of Counsel.**

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

AARON M. FINE,

HAROLD E. KOHN,
*Attorneys for Respondents.*

# SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1960.

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| Eastern Railroad Presidents Conference, et al., Petitioners, v. Noerr Motor Freight, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit. |

[February 20, 1961.]

Mr. Justice Black delivered the opinion of the Court.

American railroads have always largely depended upon income from the long-distance transportation of heavy freight for economic survival. During the early years of their existence, they had virtually no competition in this aspect of their business, but, as early as the 1920's, the growth of the trucking industry in this country began to bring about changes in this situation. For the truckers found, just as the railroads had learned earlier, that a very profitable part of the transportation business was the long hauling of heavy freight. As the trucking industry became more and more powerful, the competition between it and the railroads for this business became increasingly intense until, during the period following the conclusion of World War II, at least the railroads, if not both of the competing groups, came to view the struggle as one of economic life or death for their method of transportation. The present litigation is an outgrowth of one part of that struggle.

The case was commenced by a complaint filed in the United States District Court in Pennsylvania on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. This complaint, which named as defendants 24 Eastern rail-

roads, an association of the presidents of those railroads known as the Eastern Railroad Presidents' Conference, and a public relations firm, Carl Byoir & Associates, Inc., charged that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of §§ 1[1] and 2[2] of the Sherman Act. The gist of the conspiracy alleged was that the railroads had engaged Byoir to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as "vicious, corrupt, and fraudulent," first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and secondly, in that the defendants utilized the so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by Byoir and paid for by the railroads.[3] The complaint then went on to supplement these more or less

[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U. S. C. § 2.

[3] For a discussion of the mechanics of this technique and the purposes generally underlying its use by public relations firms, see Ross, The Image Merchants, at 118, 226–227 and 266–267.

general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill," [4] which would have permitted truckers to carry heavier loads over Pennsylvania roads.

The prayer of the complaint was for treble damages under § 4 of the Clayton Act [5] and an injunction restraining the defendants from further acts in pursuance of the conspiracy. Insofar as the prayer for damages was concerned, a stipulation was entered that the only damages suffered by the individual truck operators was the loss of business that resulted from the veto of the "Fair Truck Bill" by the Governor of Pennsylvania, and accordingly the claim for damages was limited to an amount based upon the loss of profits as a result of this veto plus the expenses incurred by the truckers' trade association for the purpose of combatting the railroads' publicity campaign. The prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organiza-

[4] The "Fair Truck Bill" referred to was introduced in the Pennsylvania Legislature in May 1951, as Senate bill 615.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

tions to propagate the arguments of the railroads against the truckers or their business, and from doing "any other act or thing to further . . . the objects and purposes" of the conspiracy.

In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights "to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the costs of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create . . . ." Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or enforcement of laws or to efforts of individuals to bring about the passage or enforcement of laws.[6]

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[6] The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment and the contention that the truckers were barred from prosecuting this suit by reason of the fact that they had themselves engaged in conduct identical to that about which they were complaining

Subsequently, defendants broadened the scope of the litigation by filing a counterclaim in which they charged that the truckers had themselves violated §§ 1 and 2 of the Sherman Act by conspiring to destroy the railroads' competition in the long-distance freight business and to monopolize that business for heavy trucks. The means of the conspiracy alleged in the counterclaim were much the same as those with which the truckers had charged the railroads in the original complaint, including allegations of the conduct of a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers. The prayer for relief of the counterclaim, like that of the truckers' original complaint, was for treble damages and an injunction restraining continuance of the allegedly unlawful practices. In their reply to this counterclaim, the truckers denied each of the allegations that charged a violation of the Sherman Act and, in addition, interposed a number of affirmative defenses, none of which are relevant here.

In this posture, the case went to trial. After hearings, the trial court entered a judgment, based upon extensive findings of fact and conclusions of law, that the railroads' publicity campaign had violated the Sherman Act while that of the truckers had not.[7] In reaching this conclusion, the trial court expressly disclaimed any purpose to condemn as illegal mere efforts on the part of the railroads to

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with regard to the railroads and were thus in *pari delicto*. Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

[7] The opinion of the District Court on the merits of the controversy is reported at 155 F. Supp. 768. An additional opinion dealing with the question of relief is reported at 166 F. Supp. 163. For reports of earlier opinions dealing with preliminary motions, see 113 F. Supp. 737, 14 F. R. D. 189, and 19 F. R. D. 146.

influence the passage of new legislation or the enforcement of existing law. Instead, it rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique;[8] and, secondly, that the railroads' campaign also had as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law. In line with its theory that restraints of trade and monopolizations resulting from valid laws are not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers, holding that no damages were recoverable for loss of business due to the veto of the Pennsylvania "Fair Truck Bill." The judgment did, however, award substantial damages to the truckers' trade association as well as the broad injunction asked for in the complaint.[9]

The conclusion that the truckers' publicity campaign had not violated the Sherman Act was reached despite findings that the truckers also had engaged in a publicity campaign designed to influence legislation, as charged in

[8] The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was "to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood." 155 F. Supp., at 814.

[9] If anything, the injunction was even broader than had been requested in the complaint for it effectively enjoined the defendants from any publicity activities against the truckers whether or not the third-party technique was used. See 166 F. Supp., at 172–173.

the counterclaim, and despite findings that the truckers had utilized the third-party technique in this campaign. Resting largely upon the fact that the efforts of the truckers were directed, at least for the most part,[10] at trying to get legislation passed that was beneficial to them rather than harmful to the railroads, the trial court found that the truckers' campaign was purely defensive in purpose and concluded that the truckers' campaign differed from that of the railroads in that the truckers were not trying to destroy a competitor. Accordingly, it held that the truckers' campaign, though technically in restraint of trade, was well within the rule of reason which governs the interpretation of §§ 1 and 2 of the Sherman Act and consequently dismissed the counterclaim.

The railroads appealed from this judgment, both as to the conclusion that they had violated the Sherman Act as charged in the original complaint and as to the conclusion that the truckers had not violated the Act as charged in the counterclaim. The Court of Appeals for the Third Circuit, one judge dissenting in part, upheld the judgment of the District Court in every respect, stating that the findings amply support the judgment and that there was

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[10] The trial court did recognize that on at least one occasion the truckers attempted to encourage legislation that would have been directly harmful to the railroads rather than beneficial to themselves. Thus, the court found: "About the middle of the decade [the 1940's] PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc." The trial court found, however, that this action of the truckers also lay within the rule of reason because "the truckers had been the target of a strong compaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes," thus making it necessary for the truckers to "be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers." 155 F. Supp., at 803.

sufficient evidence to support all of the findings.[11] This was followed by a petition for certiorari filed on behalf of the railroads and Byoir limited to the question of the correctness of the judgment insofar as it held that they had violated the Sherman Act. Because the case presents a new and unusual application of the Sherman Act and involves severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable, we granted that petition.[12]

We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States*,[13] that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations."[14] Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legisla-

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[11] 273 F. 2d 218. Chief Judge Biggs dissented from the opinion of the majority of the Court of Appeals insofar as it upheld the District Court's conclusion that the railroads and Byoir had violated the Sherman Act. For similar reasons, he concurred in that part of the majority opinion which upheld the conclusion that the truckers had not violated the Act.

[12] 362 U. S. 947.

[13] 221 U. S. 1, at 51–62.

[14] *Id.*, at 57.

[15] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Parker* v. *Brown*, 317 U. S. 341.

tive or executive branches of government so long as the law itself does not violate some provision of the Constitution.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[16] This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade.

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[16] See *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 491–493.

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[17] Secondly, and of at least equally significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one

[17] In *Parker* v. *Brown*, *supra*, this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implementation—a contention not unlike that rejected here. The reasoning underlying that conclusion was stated succinctly by Mr. Chief Justice Stone: "Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 317 U. S., at 352.

of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. We are thus called upon to consider whether the courts below were correct in holding that, notwithstanding this principle, the Act was violated here because of the presence in the railroads' publicity campaign of additional factors sufficient to take the case out of the area in which the principle is controlling.

The first such factor relied upon was the fact, established by the finding of the District Court, that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. But we do not see how this fact, even if adequately supported in the record,[18] could transform conduct otherwise lawful into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their rep-

[18] A study of the record reveals that the only evidence or subsidiary findings upon which this conclusory finding could be based is the undisputed fact that the railroads did seek laws by arguments and propaganda that could have had the effect of damaging the competitive position of the truckers. There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement. We nonetheless accept the finding of the District Court on this issue for, in our view, the disposition of this case must be the same regardless of that fact.

resentatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in *United States* v. *Rock Royal Co-op*, where it was said: "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act . . . ." [10] Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business

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[10] 307 U. S. 533, 560.

conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations,[20] is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[21] All of this caution would go for naught if we permitted

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[20] The extent to which the third-party technique is utilized in the public relations field is demonstrated by the fact, found by the District Court, that each of the several public relations firms interviewed by the railroads before they finally decided to hire the Byoir organization to conduct their publicity campaign included the use of this technique in its outline of proposed activities submitted for consideration by the railroads. See 155 F. Supp., at 778.

[21] See, *e. g., United States* v. *Harriss*, 347 U. S. 612. Cf. *United States* v. *Rumely*, 345 U. S. 41.

an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Moreover, we think the courts below themselves recognized this fact to some extent for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act. This much is apparent from the fact that the railroads' counterclaim against the truckers was not allowed. Since it is undisputed that the truckers were as guilty as the railroads of the use of the technique,[22] this factor could not have been in any sense controlling of the holding against the railroads. Rather, it appears to have been relied upon primarily as an indication of the vicious nature of the campaign against the truckers. But whatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking gov-

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[22] The District Court expressly recognized this fact in its opinion: "The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique." 155 F. Supp., at 816. This conclusion was amply supported by specific findings. Thus, the court found: "The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon." 155 F. Supp., at 803.

ernmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to pass legislation. It was the purpose and intent . . . to hurt the truckers in every way possible, even though they secured no legislation." Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers, among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But, this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the

truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen.[23] Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is

[23] Here again, the petitioners have leveled a vigorous attack upon the trial court's findings. As a part of this attack, they urge that there is no basis in reason for the finding that some shippers quit doing business with the truckers as a result of the railroads' publicity campaign. Their contention is that since the theme of the campaign was that the truckers had an unfair competitive advantage and could consequently charge unfairly low prices, the campaign would have encouraged, rather than discouraged, shippers who availed themselves of the truckers' services. This argument has considerable appeal but, as before, we find it unnecessary to pass upon the validity of these findings for we think the conclusion must be the same whether they are allowed to stand or not.

not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner prescribed by the Sherman Act is involved in this case.

In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case—a "no-holds-barred fight",[24] between two industries both of which are seeking control of a profitable source of income.[25] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made. In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.

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[24] We borrow his phrase from the dissenting opinion below of Chief Judge Biggs.

[25] Since the commencement of this litigation, a new bill increasing truck-weight limits has passed the Pennsylvania Legislature and has become law by virtue of the Governor's approval. Thus, the fight goes on.

That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. Since the railroads have acquiesced in the dismissal of their counterclaim by not challenging the Court of Appeals' affirmance of that order in their petition for certiorari, we are here concerned only with those parts of the judgments below holding the railroads and Byoir liable for violations of the Sherman Act. And it follows from what we have said that those parts of the judgments below are wrong. They must be and are

*Reversed.*